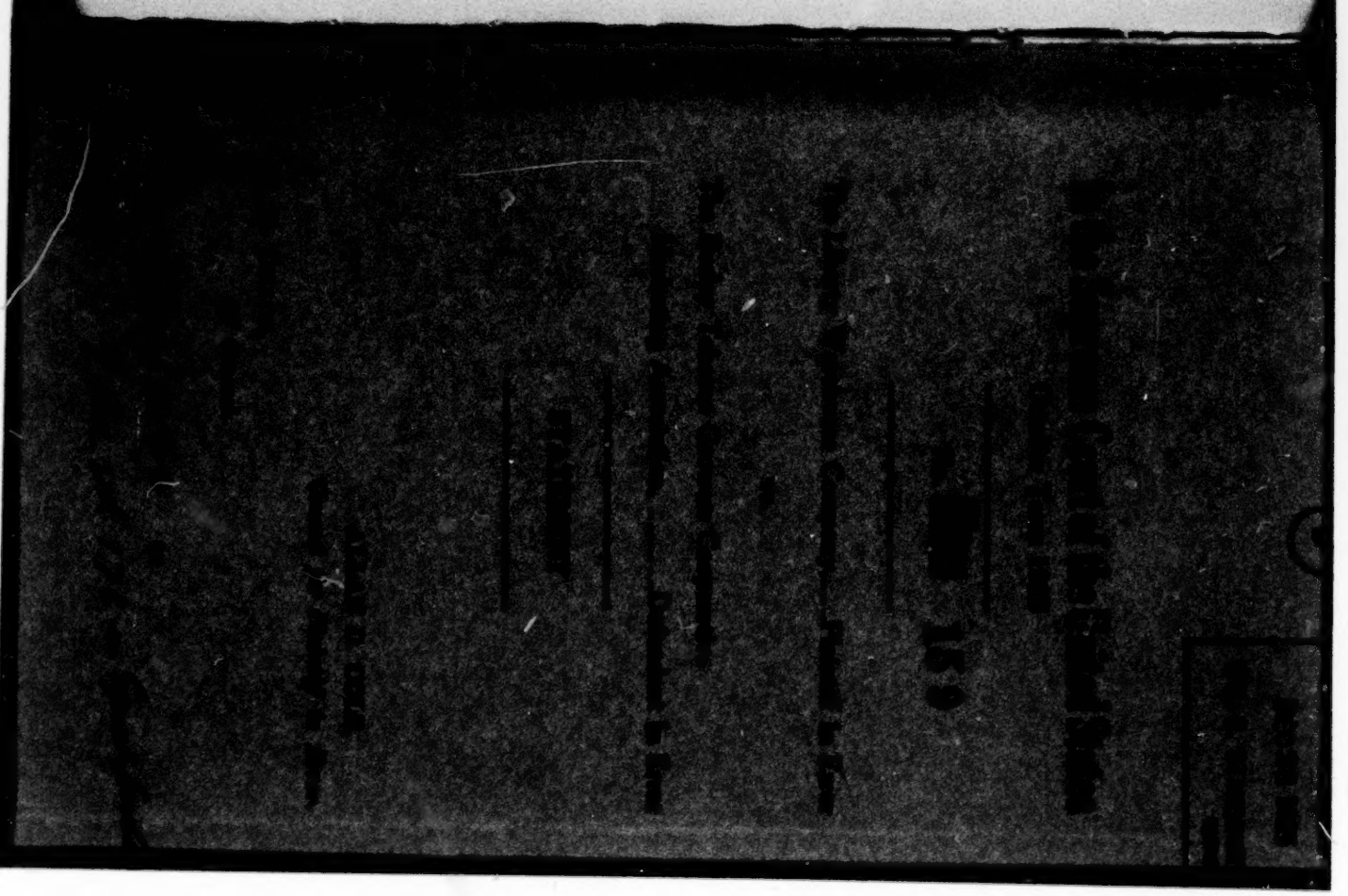


IN THE SUPREME COURT OF THE UNITED STATES

October Term 1925

No. 584.

he Liberty Warehouse Company, ... Plaintiff In Error

vs.

he Burley Tobacco Growers Cooperative Marketing Association, ... Defendant In Error

IOTION TO ADVANCE PURSUANT TO RULE 18 SUBSECTION 7

Now, comes plaintiff in error, The Liberty Warehouse Company, a corporation, by its attorney of record herein and moves this Honorable Court pursuant to rule 18 subsection 7 to advance the above styled cause for an early hearing because the matters involved are of general public interest.

ALLAN D. COLE,
Attorney for Plaintiff in Error.

M. COLLINS, Of Counsel.

NOTICE OF MOTION

The defendant in error, The Burley Tobacco Growers Cooperative Marketing Association, is hereby notified that the plaintiff in error, The Liberty Warehouse Company, will, on Monday the 18th day of January, A. D., 1926, submit the foregoing motion for the consideration of the Supreme Court of the United States.

ALLAN D. COLE,

Attorney for Plaintiff in Error.

J. M. COLLINS, Of Counsel.

Executed on the Burley Tobacco Growers Cooperative Marketing Association by delivering a true copy of the within notice to J. N. Kehoe, its Vice President, he being the Chief Officer of said Association residing in Mason County, Kentucky, this 24th day of December, 1925.

C. M. DEVORE,

Sheriff of Mason County, Kentucky.

By C. P. RASP, Deputy Sheriff.

State of Kentucky)
County of Mason) Sct.

I, B. L. Anderson, a Notary Public in and for the County and State aforesaid do certify that C. M. Devore is a regularly elected and acting sheriff of Mason County, Kentucky, and that C. P. Ra[illegible], who made the return on within notice is personally known to me and that he is one of the regularly appointed and acting Deputy Sheriffs of Mason County, Kentucky.

Given under my hand and seal this 24th day of December, 1925.

My Commission expires September 26th, 1927.

B. L. ANDERSON,

Notary Public, Mason County, Kentucky.

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1925

No. 584.

The Liberty Warehouse Company, ...Plaintiff In Error

vs.

The Burley Tobacco Growers Cooperative Marketing Association, ...Defendant In Error

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STATEMENT

MAY IT PLEASE THE COURT:

In Kentucky, where the common law prevails, growers of tobacco and other agricultural products have been exempted from its provisions, in that, as a class they are authorized through corporate organizations to market their products and to do all things necessary thereto as monopolies, pools and trusts under what is

known as the Bingham Act. See Appendix to brief of plaintiff in error.

The questions involved in this case are of general public interest for the following reasons:

In the first place, in addressing the annual convention of the American Farm Bureau Federation at Chicago recently the President is reported to have said: "I propose actively and energetically to assist the farmers to promote their welfare through cooperative marketing." In his recent message to the Congress the President is also reported to have said: "It has appeared from all investigations that I have been able to make that the farmers as a whole are determined to maintain the independence of their business. They do not wish to have meddling on the part of the government or to be placed under the inevitable restrictions involved in any system of direct or indirect price-fixing, which would result from permitting the government to operate in the agricultural markets. They are showing a very commendable skill in organizing themselves to transact their own business through cooperative marketing, which will this year turn over about $2,500,000,000, or nearly one-fifth of the total agricultural business. In this they are receiving help from the government. The Department of Agriculture should be strengthened in this facility in order to be able to respond when these marketing associations want help. While it ought not to undertake undue regulation, it should be equipped to give prompt in-

formation on crop prospects, supply, demand, current receipts, imports, exports and prices.

A bill embodying these principles, which has been drafted under the advice and with the approval of substantially all the leaders and managers in the cooperative movement, will be presented to the Congress for its enactment."

Since this court speaks with authority, it is manifestly important that before the President exercises these great powers of his office he be properly advised as to the constitutional standing of these numerous cooperative marketing associations of which defendant in error is a type, created by the various states. Whether or not, therefore, in making them vast loans and otherwise "actively and energetically assisting" cooperative marketing as practiced by them, he is discriminating in favor of one class of citizens as against another class and so denying to the latter the equal protection of the laws; indeed, whether or not, in fulfilling the promises thus made, he is really aiding, abbetting and fostering a host of illegal monopolies, pools and trusts of which defendant in error is a type, and therefore, unlawfully restraining the flow of commerce and likewise abridging the liberty of contract of citizens of United States.

In the second place, section 27 of the Articles of Incorporation of these numerous organizations of which defendant in error is a type has already been attacked upon the ground of its conflict with the 14th Amend-

ment in the Supreme Courts of the states of Kentucky, Wisconsin, and Minnesota; the first holding the section to be constitutional, the last two declaring the section in violation of the liberty of contract guaranteed by the Federal Constitution. See brief of Plaintiff in error at page 23.

In the third place, in the case at bar the validity of all the provisions of the Articles of Incorporation of these organizations of which defendant in error is a type has been called in question; and it is of vital importance, both to the vast citizenship of the United States, as well as to the numerous courts passing upon their rights and duties to know at once and with a certainty what to declare and to do.

ALLAN D. COLE,

Attorney for Plaintiff in Error.

J. M. COLLINS, Of Counsel.

FILED
[redacted]
WM. R. STANSBURY
Clerk

In the Supreme Court of the United States

October Term 1928

No. [redacted] 159

The Liberty Warehouse Company, Plaintiff in Error

vs.

Burley Tobacco Growers Cooperative Marketing Association.....Defendant in Error

Brief For Plaintiff in Error

ALBAN B. COLE,
Counsel for Plaintiff in Error.

J. M. Chapman,
Of Counsel.

INDEX

Page

Statement of Facts 1-5
Assignment of Errors 6-13
Argument 12
I. The Court of Appeals of Kentucky erred in substituting "judicial knowledge" for undisputed facts 13-17
II. Section 27 of the Bingham Act is repugnant to the 14th Amendment 16
A
It confers upon a class exclusive right to prosecute a penal action where no penal offense has been committed 17
B
It creates a cause of action unknown to the common law and is an exclusive privilege 18
C
It excludes all individuals and every corporation not organized under the Bingham Act, from a right of action for a tort against a third party for inducing a breach of contract 18
D
It takes from the jury the right to determine the amount of damages based upon the facts of the case 19
E
Its imposition of an attorneys fee is capricious and arbitrary 20
F
It infringes the liberty of contract 21-25
III. The purpose of classification under section 27 of the Bingham ACT is private, not public welfare. Such a purpose is manifested both by the language of the section and the courts interpretation thereof 25-26
IV. Section 27 of the Bingham Act undertakes to regulate interstate commerce. The language of this section is broad enough to include transactions both in interstate and intra state commerce. Since tobacco is a commodity, national in character, the warehouse is not a place of final destination; but merely a place through which the current flows from

Page

state to state. Hence, such transactions are not sales of a "localized commodity". Both the warehouses and the sales affected by the section in question are necessary factors "in the middle of this current of commerce" 27-38

V. Since the Bingham Act as a whole and section 27 in particular, are repugnant to the Federal Constitution the answer of plaintiff in error contains good defense; and its counterclaim constitutes a direct action for damages 38

A

PARAGRAPH ONE—ESTOPEL

If a recovery cannot be had upon a contract sought to be enforced which was made to further the objects of an illegal combination as held in the case of Continental Wall Paper Co. vs. Lewis Voight, etc., 212 U. S. 227, they who is defendant in error not estopped to invoke a recovery for damages against a third party for inducing the breach of contract, which, if sued upon, would itself have been unenforceable? 39-51

B

PARAGRAPH TWO OF ANSWER AND COUNTERCLAIM

The argument presented and the authorities cited in support of the first paragraph render discussion of the second unnecessary 51

C

Paragraph Three Containing Counterclaim of Plaintiff in Error Is Equivalent to a Direct Action For Damages.

Because the Court of Appeals of Kentucky held it to be correct practice to file the counterclaim, it, therefore, considered the question as to the constitutionality of the Bingham Act, both in whole and in part, but rested its disallowance thereof upon two untenable grounds. First, because of its partial repeal the remedies of the common law available against all others for violations thereof cannot be invoked in Kentucky against those of the class to which defendant in error belongs; and, second, that remedies available against all others for violations of the Sherman Anti-Trust Law, as amended, cannot be invoked herein because defendant in error as one of a favorite class has been exempted from the penalties therein provided 52-57

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Kentucky Criminal Code of Practice, sections 4 and 11 17

Act October 15, 1914, c. 323, section 6, 38, Stat. 731 37-38

Page

CASES

Adams vs. Tanner, 244 U. S. 595 26
Addyston Pipe Co., etc., U. S. 175 U. S. 211 40
American Sugar Refining Co. vs. Louisiana, 179 U. S. 89 44
American Coal Co. vs. Allegany County Comrs., 128 Md. 594 45
American Column & Lumber Co., 257 U. S. 66 46
Arkansas vs. K. & T. Coal Co., 183 U. S. 190 15
Atchison, etc., R. R. Co. vs. Matthews, 174 U. S. 104 18
Atchison, etc., R. R. Co. vs. Vosburg, 238 U. S. 59 20
Austin vs. Tenn. 179 U. S. 343 32
Bacon vs. St. Paul Union Stockyards Co., 201 N. W. 326 22
Binderup vs. Pathe Exchange, 263 U. S. 309 30
Bowman vs. Chicago Ry. Co., etc., 125 U. S. 498 35
Brass vs. North Dakota, 152 U. S. 391 27
Brown vs. Piper, 91 U. S. 37 15
Brown vs. Jacobs Pharmacy Co., 115 Ga. 429 45
Carellos vs. Zotalis, 145 Minn. 292 22
Cantins vs. Tillman, 54 Fed. 974 45
Charles A. Ramsay Co. vs. Associated Bill Posters 269 U. S. 501 48
Chambers & Marshall vs. Baldwin, 91 Ky. 121 18
12 C. J. 1234 19
Clabough vs. Southern Wholesale Growers Association 181 Fed. 706 52
C. N. O. Fuel Co. vs. U. S. 155 Fed. 610 40
Com. vs. Abraham, 156 Mass. 57 45
Collins vs. New Hamp. 171 U. S. 33 37
Commonwealth vs. Hatfield Coal Co., 186 Ky. 411 41
Connolly vs. Union Sewer Pipe Co., 184 U. S. 540 45
Continental Wall Paper Co. vs. Lewis Voight, etc., 212 U. S. 227 39
Coo'. vs. Marshall County, 196 U. S. 261 32
Crutcher vs. Kentucky, 141 U. S. 47 36
Davis vs. Mass. 167 U. S. 17 45
Duplex Printing Press Co. vs. Deering, 254 U. S. 469 37
Eubank vs. Richmond, 226 U. S. 137 26
Ex parte vs. Jervey, 66 Fed. 959 35
Federal Trade Commission vs. Sinclair Refining Co. 261 U. S. 463 48
First National Bank vs. Ayers, 160 U. S. 667 16
Ford Motor Co. vs. Union Motor Sales Co., 244 Fed. 156 40
Forbes vs. Cooper, 88 Ky. 285 52
Goy vs. Brent, 166 Ky. 883 41
German Alliance Insurance Co. vs. Lewis, 233 U. S. 389 27
Gibbons vs. Odgen, 9 Wheat 1 34
Gulf C. & S. F. Ry. Co. vs. Ellis, 165 U. S. 150 46
Hannibal & St. J. vs. Titusville, 153 U. S. 289 34
Henderson vs. Meyer, 92 U. S. 259 36
Hing vs. Crowley, 113 U. S. 702 44

Page

Jervey vs. The Carolina, 66 Fed. 1013 35
Knawer vs. U. S. 237 Fed. 8 40
Lawton vs. Steele, 152 U. S. 137 25
Lemke vs. Farmers Grain Co., 258 U. S. 50 31
Leizy vs. Harden, 135 U. S. 100 33
Liberty Warehouse Co. vs. Burley Tobacco Growers Cooperative Marketing Association 208 Ky. 643 28
L. & N. vs. Finn, 235 U. S. 608 20
L. & N. vs. Pointer, 113 Ky. 54
Notes to 60 L. R. A. 640 33
40 L. R. A. (N. S.) 866 33
L. R. A. 1915f 829 23
L. R. A. 1918 f 542 23
Love vs. Kozy Theatre Co., 193 Ky. 336 41
McFarland vs. American Refining Co., 241 U. S. 79 44
McLean vs. Arkansas, 211 U. S. 539 26
McKinster vs. Sager, 163 Ind. 671 45
Miles Medical Co. vs. John D. Park, etc., Co. 220 U. S. 373 40
Miller vs. Wilson, 236 U. S. 373 23
M. K. & T. Ry. Co. vs. Haber, 196 U. S. 663 34
Minnesota Wheat Growers Cooperative Marketing Association vs. Radke, 204 N. W. 314 21
Minn. Rates Cases, 230 U. S. 362 35
Monarch Tobacco Works vs. American Tobacco Co., 165 Fed. 774 40
Munn vs. Ill. 94 U. S. 113 26
New York, etc., Ry. Co. vs. Bristol, 151 U. S. 567 45
Noble State Bank vs. Haskell, 219 U. S. 104 26
North Hempstead vs. Gregory, 65 N. Y. S. 867 15
Northern Wisconsin Cooperative Tobacco Pool vs. Bekedal 182 Wis. 571 23
O'Halloran vs. American Sea Green Slate Co., 207 Fed. 187 40
In re: Opinion of Justices, 211 Mass. 618 18
Peeka vs. State, 159 Ind. 211 45
People vs. Coolidge, 124 Mich. 664 45
Peyroux vs. Howard, 7 Pet. 342 15
Phil. & Southern S. S. Co. vs. Penn. 122 U. S. 326 35
Powell vs. Brunswick Co., Supra 150 U. S. 433 16
Ry. Co. vs. Beckwith 129 U. S. 26 44
Railroad Company vs. Husen, 95 U. S. 465 36
R. C. L. 1060 14
19 R. C. L. section 155 54
19 R. C. L. section 21 48
6 R. C. L. section 396 44
6 R. C. L. page 453 19
5 R. C. L. page 765 33
5 R. C. L. page 770 33

	Page
In re: Sanders, 52 Fed. 802	36
Schollenberger vs. Penn. 171 U. S. 1	34
Shoshone Mining Co. vs. Rutter, 171 U. S. 513	54
Slone vs. Slone, 12 Met. 339	52
Stafford vs. Wallace, 258 U. S. 516	30
State vs. Bohemier, 96 Me. 257	45
State vs. Latham, 115 Me. 176	45
State vs. Jacobson, 80 Ore. 648	36
Sweney vs. Smith, 167 F. 385	22
Swift & Company vs. United States, 196 U. S. 375	31
Thayer Ev. Chap. 7, 281	16
Truax vs. Corrigan, 257 U. S. 335	45
U. S. vs. American Linseed Oil Co. 262 U. S. 388	46
U. S. vs. American Tobacco Co., 221 U. S. 106	48
U. S. vs. Kellog Toasted Corn Flakes Co., 222 Fed. 725	40
Vance vs. Vandercook Co., 170 U. S. 344	35
Walton vs. Stafford, 43 N. Y. S. 1049	15
Whitlock vs. Redford, 82 Ky. 390	52
Wilder vs. Corn Products Co., 236 U. S. 165	56
Williams vs. Evans, 139 Minn. 32	23
Wolf Packing Co. vs. Court of Industrial Relations of Kansas 45 S. Ct. 441	24

IN SUPREME COURT OF THE UNITED STATES
October Term 1925

No. 584.

The Liberty Warehouse Company, Plaintiff in Error

vs.

Burley Tobacco Growers Cooperative Marketing Association, Defendant in Error.

Error to the Court of Appeals of Kentucky.

Brief For Plaintiff in Error

May It Please the Court:

Statement

The plaintiff in error, The Liberty Warehouse Company, a Kentucky corporation, is engaged in the business of a warehouseman, a large portion of whose business consists of shipments of tobacco from growers in Missouri, West Virginia, and Ohio, in bulk and in hogsheads or original packages to be sold over the floor

of its loose leaf warehouse in Maysville to citizens of Kentucky and other states in response to whose demands these shipments are made and who buy them in bulk or hogsheads or original packages and also as loose leaf when taken therefrom through the agency of plaintiff.

The defendant in error, The Burley Tobacco Growers Cooperative Marketing Association, is a Kentucky corporation organized under what is known as the Bingham Act by numerous tobacco growers in what is known as the Burley Tobacco District who have heretofore been competitors in the open market in the sale of their products, but who now agree through corporate organizations to market their products to manufacturers throughout the United States at a price to be fixed by an executive committee; the members of the association not being permitted to sell their products to any one except to the association and at prices to be fixed by it and not being permitted to buy or sell their products in competition with each other; provisions being made for reports of the sales of the products shipped by the various members to the organization and the prices thereof and the profits of the organization in excess of payments made on delivery to be paid to the members of the association.

Now, this is a proceeding, under the Kentucky Declaratory Judgment Act and involves the validity of

said Bingham Act as an entirety, as well as section 27 thereof in particular, which section is as follows:

"Any person, firm or corporation conducting a warehouse within the State of Kentucky who solicits or persuades or permits any members of any association organized hereunder to breach his marketing contract with the association by accepting or receiving such members products for sale or for auction or for display for sale, contrary to the terms of any marketing agreement of which said person or any member of the said firm or any active officer or manager of the said corporation has knowledge or notice, shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred ($500) dollars for each said offense; and such association shall be entitled to an injunction against such warehouseman to prevent further breaches and a multiplicity of action thereon. In addition, said warehouseman shall pay to the association a reasonable attorneys fee and all costs involved in any such litigation or proceeding at law. This section is enacted in order to prevent a recurrence or outbreak of violence and to give marketing associations an adequate remedy in the courts against those who encourage violation of co-operative contracts". Acts of General Assembly of Kentucky, January 10, 1922, c. 1. p. 21, 27, R. 3.

Now, in the course of conducting the business of an illegal monopoly, pool and trust, the defendant in error suffered a breach of contract by one of its mem-

bers who refused to deliver his tobacco to it, but sold it over the floor of the loose leaf warehouse of plaintiff in error.

Hence, defendant in error pursuant to section 27 of said Bingham Act brought suit against plaintiff in error for the fixed sum of five hundred ($500) dollars and attorneys fees on account of this transaction in the course of its business. Plaintiff in error demurred to the petition, but its demurrer was overruled. Thereupon plaintiff in error filed an answer and counterclaim containing three paragraphs.

In the first paragraph plaintiff in error alleged facts showing defendant in error to be an alleged monopoly, pool and trust, and plead these facts in estoppel of its right to recover damages for inducing the alleged breach of contract. R. 18.

In the second paragraph plaintiff in error plead that section 27 of the Bingham Act is repugnant to the 14t4h Amendment to the Federal Constitution. R. 19.

In the third paragraph plaintiff in error, among other things, alleged facts showing that it was and is engaged in interstate commerce and that the Bingham Act is in conflict with the Federation Constitution, as well as the Sherman Anti-Trust Law, as amended, and, therefore, alleged injury done to its business by reason of the conduct of the business of defendant in error as an alleged monopoly, pool and trust, of which the transaction sued on is a part. R. 19-24.

Entitled to damages at common law, plaintiff in error, counter-claimed against defendant in error for the injury done its business; but also invoked treble damages under the Sherman Anti-Trust Law in the sum of ($60,000).

However, the trial court overruled the demurrer of plaintiff in error to the petition, sustained the demurrer of defendant in error to the first and second paragraphs of said answer and counterclaim as amended and struck out the third paragraph thereof as amended; but ordered and made said third paragraph a part of the record for the purpose of appeal. Thereupon, the plaintiff in error declining to plead further the trial court, in effect, declared the Bingham Act as a whole and section 27 in particular, to be constitutional; and, consequently, entered judgment against plaintiff in error for ($500) and in addition thereto awarded defendant in error an attorneys fee of $100.00, to all of which judgment plaintiff in error objected and excepted, and which, on an appeal to the Court of Appeals of Kentucky was on May 1, 1925, affirmed, and, having been taken to this court on writ of error, is now sought to be reversed on the grounds hereinafter set forth. R. 25.

ASSIGNMENT OF ERRORS

Now comes the said appellant, Liberty Warehouse Company, the plaintiff in Error, and avers that in the record, proceedings, decision and final judgment of

the Court of Appeals of Kentucky, in the above entitled cause, there is manifest error to its prejudice and it, therefore, makes the following assignment of errors therein, to-wit:

First. The said Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in affirming and in not reversing the judgment of the Mason Circuit Court.

Second. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding an Act of the General Assembly of the Commonwealth of Kentucky indexed and cited as "The Bingham Co-operation Marketing Act", approved January 10, 1922, not in conflict with or contrary to the 14th Amendment to the Constitution of the United States.

Third. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding that section 27 of said Bingham Act of the General Assembly of the Commonwealth of Kentucky and cited as "The Bingham Co-operative Marketing Act", approved January 10, 1922, not in conflict with or contrary to the 14th Amendment to the Constitution of the United States.

Fourth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding said Act of the General Assembly of the Commonwealth of Kentucky indexed and

cited as "The Bingham Co-operative Marketing Act", approved January 10, 1922, not in conflict with or contrary to Article 1, section 8 to the Constitution of the United States.

Fifth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding section 27 of said Act of the General Assembly of the Commonwealth of Kentucky not in conflict with or contrary to the Commercial Clause of the Constitution of the United States.

Sixth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding said Act of the General Assembly of the Commonwealth of Kentucky not in conflict with or contrary to the Sherman Anti-Trust Law and the Clayton Amendment thereto.

Seventh. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding section 27 of the General Assembly of the Commonwealth of Kentucky not in conflict with or contrary to the Sherman Anti-Trust Law and the Clayton Amendment thereto.

Eighth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding, upon the undisputed facts disclosed by the record, that neither said Act of the General Assembly of the Commonwealth of Kentucky nor any of its sections was contested because of an uncon-

stitutional administration of its provisions.

Nineth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding, upon the undisputed facts disclosed by the record, that the constitutionality of said Act of the General Assembly of Kentucky and the various provisions thereof were contested only upon the ground that the provisions thereof themselves were unconstitutional and in refusing even upon said ground to hold said Act invalid.

Tenth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights, upon the undisputed facts disclosed by the record, in drawing an invalid distinction between an unconstitutional administration of the provisions of said Act of the General Assembly of the Commonwealth of Kentucky and the administration of the provisions of said unconstitutional Act; and in refusing to give effect to the commercial clause of the Constitution of the United States and to the 14th Amendment thereto.

Eleventh. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in refusing to give effect to the Sherman Anti-Trust Law and the Clayton Amendment thereto; and in holding and deciding, upon the undisputed facts disclosed by the record, that said Clayton Amendment absolutely excludes agricultural products from the provisions of the Sherman Anti-Trust Law.

Twelfth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding that because section 27 of said Act of the General Assembly of the Commonwealth of Kentucky does not, until completed, penalize any of the steps necessary for the removal of tobacco in interstate commerce, it does not, therefore, regulate or interfere with the interstate commerce or violate the commercial clause of the constitution of the United States.

Thirteenth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding that the Commonwealth of Kentucky under section 27 of the Act in question has power to regulate interstate commerce in that by virtue of said section plaintiff in error can be penalized for any steps necessary for the removal of said tobacco to its warehouses in Kentucky, when after the removal of said tobacco to its warehouses in Kentucky, plaintiff in error does something in addition to steps taken by it necessary to such removal **whereby** the violation of the members contract with the association, beginning with the steps necessary for the removal of said tobacco in interstate commerce, thereafter becomes **"complete"**; and in holding and deciding where Acts done partly in one state and partly in another state together constitute a violation which can be penalized as an offense that such statute is not a regulation of interstate commerce.

Fourteenth. The Court of Appeals of Kentucky

erred to the prejudice of plaintiff in error's substantial rights in not holding and deciding that section 27 of said Act violates the 14th Amendment of the Federal Constitution by giving the cause of action therein provided only to cooperative associations to which defendant in error belongs for the violation mentioned in said section and by excluding therefrom and in not providing a similar remedy for all individuals and other corporations.

Fifteenth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in not holding and deciding that section 27 of said Act violates the 14th Amendment to the Federal Constitution because it takes from the jury the right to determine the amount of damages that should be recovered and thus denies it the equal protection of the laws.

Sixteenth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in not holding and deciding that section 27 of said Act violates the 14th Amendment to the Federal Constitution by denying to it the equal protection of the laws in that it contains no provision for plaintiff in error to recover an attorneys fee against defendant in error in the event it should induce the patrons of plaintiff in error to breach their contracts and deliver their tobacco to it.

Seventeenth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial

rights in not holding and deciding section 27 of said Act violates the 14th Amendment of the Federal Constitution in that it prescribes for cooperative associations alone and not to others a penal action without the creation of a public offense as provided in Kentucky Criminal Code, section 11, whereby the equal protection of the laws is denied to all individuals and to all corporations not included in said Act.

Eighteenth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in not holding and deciding that section 27 of said Act violates the 14th Amendment of the Federal Constitution in prescribing a special cause of action unknown to the common law in favor of defendant in error and not to plaintiff in error whereby the equal protection of the laws is denied to plaintiff in error.

Nineteenth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in not holding and deciding that section 27 of said Act violates the 14th Amendment of the Federal Constitution because it takes from the jury the right to determine the amount of damages, if any, that should be recovered and thus deprives it of due process of law.

Twentieth. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding that where there is allegation and proof that a monopoly has actually been created or that trade has been restrained a monopolistic con-

tract or one in restraint of trade cannot be annuled as violative of the Anti-Trust provisions of the Sherman Act or that the said Bingham Act has power and authority to validate such a contract.

Twenty-first. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in taking and substituting "judicial knowledge" of an alleged history of the country and current events as a controlling reason to the exclusion of the undisputed facts disclosed by the record and thereby denying to plaintiff in error due process of law.

Twenty-second. The Court of Appeals of Kentucky erred to the prejudice of plaintiff in error's substantial rights in holding and deciding that section 27 of said Act does not violate the 14th Amendment to the Federal Constitution in that it gives to defendant in error additional cause of action growing out of the poolers contract and withholds the privilege from plaintiff in error and all others similarly situated and thus denies the equal protection of law to all individuals and all corporations not included in said Act.

For the foregoing prejudicial errors and each of them affecting the merits of this cause, the plaintiff in error prays a reversal of the judgment of said Circuit Court of Mason County, Kentucky, and the judgment of affirmance thereof by the Court of Appeals of Kentucky.

And the said Liberty Warehouse Company, Plain-

tiff in Error, prays that the judgment aforesaid, for each of the errors aforesaid, and for other errors in the record and proceedings in said cause, whereby the said Plaintiff in Error has been by said judgment deprived of said rights, privileges and immunities and for each of the errors and matters above assigned be reversed, annulled and held for naught; that said Plaintiff in Error may be restored to all things it has lost by reason of said judgment of said Circuit Court of Mason County, Kentucky, and by the affirmance theerof by the said Court of Appeals of Kentucky.

ARGUMENT

I.

The Court of Appeals of Kentucky Erred to the Prejudice of Plaintiff in Error's Substantial Rights in Taking and Substituting "Judicial Knowledge" of an Alleged History of the Country and Current Events as a Controlling Reason to the Exclusion of the Undisputed Facts Disclosed by the Record and Thereby Denying to Plaintiff in Error Due Process of Law.

Before discussing in detail the alleged errors it may be well in a general way to point out that the Court of Appeals of Kentucky attempts to justify legislative action with respect to what is believed to be an unconstitutional statute by resorting to the doctrine of "judicial knowledge" to the exclusion of admitted facts

which do not justify the legislative action in controversy.

In the opinion of the court herein, it is said: "We take judicial knowledge of the history of the country and current events and from that source we know that conditions at the time of the enactment of the Bingham Act were such that the agricultural producer was at the mercy of speculators and others who fixed the price of the selling producer and the final consumer through combinations and other arrangements, whether valid or invalid, and that by reason thereof the farmer obtained a grossly inadequate price for his products. So much was that the case that the intermediate handlers between the producer and final consumer injuriously operated upon both classes and fattened and flourished at their expense. It was and is also a well known fact that without the agricultural producer society could not exist and the oppression brought about in the manner indicated was driving him from his farm thereby creating a condition fully justifying an exception in his case from any provision of the common law, and likewise justifying legislative action in the exercise of its police power." R. 34.

Now, in R .C. L. 1059, it is said: "But matters of which courts have judicial knowledge are uniform and fixed, and do not depend upon uncertain testimony; as soon as a circumstance becomes disputable, it ceases to fall under the head of common knowledge,

and so will not be judicially recognized. A matter properly a subject of judicial notice must be "known", that is, well established and authoritatively settled, not doubtful or uncertain. In every instance the test is whether sufficient attaches to the fact involved as to make it safe and proper to assume its existence without proof." Walton vs. Stafford 43 N. Y. S. 1049; North Hempstead vs. Gregory, 65 N. Y. S. 867.

In the case of Peyroux vs. Howard, 7 Pet. 342, it is said: "It cannot certainly be laid down as a universal, or even as a general proposition, that the court can judicially notice matters of fact. Yet, it can not doubt, that there are many facts, particularly with respect to geographical positions of such public notoriety, and the knowledge of which is to be derived from other sources than **parol proof**; which the court may judicially notice."

In the case of Brown vs. Piper, 91 U. S. 337, it is said: "This power is to be exercised by courts with caution. Care must be taken that the requisite notoriety exists. Every reasonable doubt upon the subject should be resolved promptly in the negative."

Therefore, in the case of Arkansas vs. K. & T. Coal Co., 183 U. S. 190, it is said: "And as to **judicial knowledge** the principle applies "that the right of a court to act upon what is in point of fact known to it, must be subordinate to those requirements of form, and orderly communication which regulate the mode of

bringing controversies into court, and of stating and conducting them." Thayer Ev. Chap. 7, 181."

Hence, in the case of Powell vs. Brunswick Co. Supers, 150 U. S. 433, it has been held that judicial knowledge could not be resorted to to raise controversies not presented by the **record**, as follows: "If it appear from the **record** by clear and necessary intendment that the Federal question must have been directly involved so that the state court could not have given judgment without deciding it, **that will be sufficient**; but resort cannot be had to the expedient of importing into the record the legislation of the state **judicially known** to its courts, and holding the validity of such legislation to have been drawn in question, and a decision necessarily rendered thereon, in arriving at conclusions upon the matters **actually presented and considered.**"

In the case of First National Bank vs. Ayers, 160 U. S. 667, it is said: "From the record in this case it is wholly impossible to determine that there is any discrimination against the holders of national bank stock. In order to come to a decision in favor of the plaintiff in error it would be necessary for this court to take what counsel for plaintiff calls, "judicial notice" of what is **claimed** to be a fact, viz., that the moneyed capital in the state of Kansas from which debts may be deducted as compared with the moneyed capital invested in the shares of national banks, was so large and

substantial as to amount to an illegal discrimination against natioanl bank shareholders. **This we cannot do. There is no proof whatever upon the subject."**

Since the supremacy of the Federal Constitution is the question at issue, it is submitted that this court, in determining whether or not it will resort to the doctrine of "judicial knowledge" herein, is obligated to follow its own decisions.

II.

Section 27 Of the Bingham Act Is Repugnant to the 14th Amendment to the Federal Constitution.

A

Now, in the first place, it will be observed that the liability imposed upon plaintiff in error and the cause of action resulting to defendant in error therefrom is either a civil action for a penalty, or else a proceeding in the nature of a suit for unliquidated damages. But a penal action cannot be prosecuted without the commission of a public offense, Kentucky Criminal Code, section 11; and a criminal offense is defined to be "any act or commission for which the law has prescribed a punishment." Kentucky Criminal Code, section 4. Since section 27 of the Bingham Act undertakes to confer upon defendant in error and others of its class the exclusive right to prosecute a penal action where no penal offense has been committed, it denies to plaintiff in error the equal protection of the laws, therefore, repugnant to the 14th Amendment.

B

In the second place, if the right of recovery so conferred upon defendant in error by section 27 be not a penal action, but a proceeding in the nature of a suit for unliquidated damages; it still denies to plaintiff in error, in particular, the equal protection of the laws, in that it creates a cause of action unknown to the common law, as declared in the case of Chambers & Marshall vs. Baldwin, 91 Ky. 121; and, hence, is an exclusive privilege and, therefore, repugnant to the 14th Amendment.

C

In the third place, it denies to plaintiff in error the equal protection of the laws in that it excludes **all** individuals and **every** corporation not organized under the Bingham Act from the enjoyment of a right of action for a tort against a third party for inducing or persuading one of the parties to breach a contract, and, hence, is repugnant to the 14th Amendment. For, in the case of Atchison, etc., R. R. Co., vs. Matthews, 174 U. S. 104, it is said:

"It cannot pick out one individual or one corporation and enact whenever he or it is sued that judgment shall be for double damages or subjected to an attorneys fee in favor of the plaintiff, when no other individual or corporation is subjected to the same rule." In re: Opinion of Justice, 211 Mass. 618.

D

In the fourth place, section 27 of the Bingham Act is repugnant to the 14th Amendment in that it denies to plaintiff in error due process of law, as well as, the equal protection of the laws, in that it takes from the jury the right to determine and from the plaintiff in in error the right to have them determine the amount of damages to the "property" of defendant in error based upon the facts of the case. For in 6 R. C. L. at page 453, it is said:

"It has been judicially stated that it is beyond the power of the legislature to restrain a defendant in any suit from setting up a defense to an action against him, and that due process of law not only requires that a party shall be properly brought into the court, **but that he shall have the opportunity when in court to establish any fact, which, according to the usages of common law or provisions of the constitution, would be a protection to his property or his liberty. Due process of law clearly implies the right of a person affected thereby to present before the tribunal which pronounces judgment concerning his life, liberty or property, to be heard by testimony or otherwise, and to have the right of controverting by proof every material fact which bears upon the question of right in the matter involved"** In 12 C. J. 1234, it is said:

"Due process of law requires an orderly proceeding adapted to the nature of the case, in which proceeding

the citizen has a right and an opportunity to be heard and to defend, protect, and enforce his rights, by establishing **any fact** which, under the law, would be a **protection** to him or to his **property.**" L. & N. vs. Finn 235 U. S. 608.

E

In the fifth place, the provision in section 27 for the allowance of attorneys fees denies to plaintiff in error the equal protection of the law, in that the classification is based upon persons and not upon the character of the litigation. It is capricious and arbitrary. For section 27 imposes a civil liability of ($500) besides attorneys fees whether the member's products exposed for sale are worth $50.00 or $500. Hence, it is rupgnant to the 14th Amendment. Atchison etc., Ry. Co. vs. Vosburg, 238 U. S. 59.

Indeed, it will be seen that the Vosburg case is decisive when it is observed that section 27 no where imposes a penalty or liability in the event a member of the association should solicit or persuade any non-member to breach his contract with any other non-member with respect to his tobacco and induce him to become a member of and deliver it to the association and thus take the tobacco contracted to be sold over plaintiff in error's loose leaf floor, even tho such solicitation or persuasion of permission systematically pursued should result in breaches of contract to such an extent as utterly to destroy the business of plaintiff in error. Indeed,

why should not plaintiff in error and all others excluded from the favoritism of section 27 also have an adequate remedy in the courts against those who encourage violations of their contracts? If the public health, welfare and morals are affected in the one case, why are they not equally so in the other? If not in either case, then what occasion is there for the exercise of the police power?

F

In the sixth place, section 27 of the Bingham Act prohibiting third parties to buy or handle products under contract with defendant in error infringes the liberty of contract guaranteed to plaintiff in error by the 14th Amendment and the remedies for violations of said section fall with it.

For in the case of Minnesota Wheat Growers Co-operative Market Association vs. Radke 204 N .W. 314, it is said: "Where parties voluntarily become members of an association operating under a statute fixing their rights and duties and providing remedies and penalties for breaches or violations, they may be held to have agreed, to all the terms of the statute, and are not in a favorable position to complain of infringement of the liberty of contract or that the damages or penalties prescribed in the statute are too drastic. But no consent can be imputed to non-members. No contractual relation exists between them and the association or its members. Of course, it is well settled that a

malicious interference by one not a party to a contract to induce its breach is a tort for which redress may be had. Canellos vs. Zotalis, 145 Minn. 292, 177 N. W. 133, Bacon vs. St. Paul Union Stockyards Co. (Minn.) 201 N. W. 326. But section 27 does not stop with those who maliciously interfere with existing contracts between third parties. It makes it an actionable wrong for one who has used no effort or held out no inducement for a member of a co-operative market association to breach his contract with the association, except this, **that he is ready at his usual place of business to buy or handle products that such member may voluntarily bring there for sale or disposal, the same as for an outsider.**

In other words, the section attempts to prevent **all** dealings **between members of a cooperative marketing association and outsiders** in respect to products contracted for by the association, no matter how free from legal malice or devoid of inducement the conduct of the outsiders may have been, provided they knew that the product was under contract. The court in Sweeney vs. Smith (C. C.) 167 F. 385, (affirmed in 171 F. 645, 96 C. C. Q. 919) said:

"I have been referred to no decision, and I have found none, in which mere knowledge of the earlier contract was held to be the equivalent of inducement or persuasion or (still less) of fraudulent conduct."

On the reargument of Northern Wisconsin Co-

operative Tobacco Pool vs. Bekedal, 182 Wis. 571, N. W. 936, the court modified the injunction so that defendant was permitted to purchase from those members of the plaintiffs association who had voluntarily breached their contract with the plaintiff, thus recognizing the constitutional right of liberty of contract. As section 27 reads, a purchase from a member who has voluntarily breached his contract with the association is within its condemnation. For, when such member without inducement from an outsider brings to the latters place of business for sale or disposal a commodity which is under contract for delivery to his association, he has breached his contract with it, and must be held to have so breached it voluntarily.

It seems clear to us that it is beyond the power of the Legislature to make it a tort to purchase, in the ordinary course of a legitimate business, from the true owner a wholesome staple commodity upon which there is no lien and which is not under any ban or regulation because of inherent qualities or use. Liberty of contract is assured by both state and federal constitutions. Williams vs. Evans, 139 Minn. 32, 165, N. W. 495, 166 N. W. 504, L. R. A. 1918 F, 542, and cases therein cited. This liberty of contract as said in Miller vs. Wilson, 236, U. S. 373, 35, S. Ct. 343, 59 L. Ed. 628, L. R. A. 1915 F, 829, "is freedom from arbitrary restraint_____not immunity from reasonable regulation to safeguard the public interest; the question is

whether the restrictions of the statute have reasonable relation to a proper purpose." The latest utterance on this subject is Wolf Packing Co. vs. Court of Industrial Relations of Kansas, 45 S. Ct. 441, 69 L. Ed. ____, opinion filed by United States Supreme Court April 13, 1925. Respondent argues that the marketing of agriculture products is fraught with such public interest as to justify regulation. Conceding that to be so, we are nevertheless convinced that the length to which the section mentioned goes is an arbitrary restraint and not a proper regulation. The last paragraph in the section, intended perhaps, evidently to express the legislative purpose, is evidently borrowed from the experience of other states relating to crops not raised to any important extent in this state. But even so, we can discover no public interests so affected by the ordinary manner of marketing staple agricultural products that every one except associations formed under this law must be forbidden to purchase or handle the same, if offered for sale or disposition in the usual course, of trade by members of co-operative market associations who have not been solicited so to do by the holding out of questionable inducements.

Entertaining the view that section 27 clearly invades the freedom of contract guaranteed both by the state and federal constitutions, it cannot stand. And since the right of injunction, the damages, and attorneys fees therein provided must necessarily fall with it,

there is no necessity to consider whether the remedies are so drastic as, on that account alone, to vitiate the section.

The order in each case must be reversed."

III.

The Purpose of Classification Under Section 27 of the Bingham Act Is Private, Not Public Welfare.

Manifestly, the purpose of the classification is to protect co-operative contracts **exclusively**, as is evidenced both by the opinion of the Kentucky Court of Appeals herein and by the language of the section itself relating to this point, which is as follows:

"This section is enacted in order to prevent a recurrence or out break of violence and to marketing associations an adequate remedy in the courts against those who encourage violations of **co-operative** contracts." In this connection the court said. "The **penalty** imposed upon the warehouseman is directed **solely** against it to prevent it from destroying **any contractual relations existing between plaintiff and its members.**" R. 36 (fol. 69).

Now, in the case of Lawton vs. Steele, 152 U. S. 137, it is said: "To justify the state in thus interposing its authority in behalf of the public, it must appear, first, that the interests of the public generally, as distinguished from those of a **patricular** class, requires such interference; and, second, that the means are reason-

ably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals. The legislature may not, under the **guise** of protecting the **public** interests arbitrary interfere with private business or impose **unusual** or **unnecessary restriction** upon lawful occupations. In other words, its determination as to what is the proper exercise of its police power is not final or exclusive, but is subject to the supervision of the courts."

In the case of Adams vs. Tanner, 244 U. S. 595, it is said: "Certainly, there is no profession, possibly no business, which does not offer peculiar opportunities for reprehensible practices; and as to every one of them, no doubt, some can be found quite ready earnestly to maintain that its depression would be in the public interest. Skillfully directed agitation might also bring about apparent condemnation of every one of them by the public. Happily for all, the fundamental guaranties of the constitution cannot be freely submerged if any whenever some ostensible justification is advanced and the public power is invoked."

Moreover, in the multitude of decisions of the U. S. Supreme Court involving the right of a state to regulate private business, the distinction is always clearly drawn between private welfare and public welfare. Noble State Bank vs. Haskell, 219 U. S. 104, Eubank vs. Redmond, 226 U. S. 1337, Munn. vs. Ill., 94 U. S. 113; Adams vs. Tanner, 244 U. S. 590; McLean vs.

Arkansas, 211 U. S. 539, Brass vs. North Dakota, 152 U. S. 391; German Alliance Insurance Co. vs. Lewis, 233 U. S. 389.

IV.

Section 27 of The Bingham Act Undertakes to Regulate Interstate Commerce

Now, in the first place, it will be observed that section 27 is directed against "any person, firm or corporation, operating a warehouse within the state of Kentucky," whether residing in Kentucky or out of it.

In the second place, that the statute is violated whenever any such person, firm or corporation, whether in or out of Kentucky, solicits or persuades or permits any member of any association," whether in or out of Kentucky, to breach his marketing contract.

In the third place, that such solicitation or persuasion or permission, whether in or out of Kentucky, consists merely in "accepting or receiving such members products," whether in or out of Kentucky, "for sale, or for auction or for display for sale" in Kentucky.

Conceiving section 27 to be violative of the commercial clause of the Federal Constitution, plaintiff in error called into question the validity thereof, both by demurrer to the petition and plea thereto asserting such constitutional rights.

Declining to hold that section 27 relates solely and exclusively to transactions in intra-state commerce, the

Court of Appeals of Kentucky in 208 Ky. 643, disposed of the question arising from the allegations of the petition framed by defendant in error and from the language of the section itself as follows:

"Neither do we attach any **importance** to the interstate commerce feature attempted to be injected into the case of counsel for defendant.

In the first place, it is not shown that the tobacco of the member whose contract defendant is charged with assisting to violate ever moved in interstate commerce, i. e., whether it was produced in this state and so moved. Again, it is extremely doubtful if it continued in interstate commerce after it had been removed from another state (if that was the fact) to defendants warehouse. Section 27 of the act does not attempt to penalize any of the steps necessary for such removal, and when the tobacco was deposited in defendants warehouse the latter would not be liable to the penalties of the act, unless it did something subsequent thereto to **complete** the violation of the members contract with the association. Whatever, therefore, was **thereafter** done, would be in relation to a **localized** and would **appear** to not involve the question of interstate commerce. But, beyond all that, we have seen that the Clayton Amendment to the Sherman Anti-Trust Law excludes such products from the provisions of the latter act, and thereby Congress relinquished its superior right to regulate interstate commerce with

eference to them and restored the right of the states o do so as long as that condition existed. It is there- ore clear that the case is not one in violation of the herman Anti-Trust Act for which defendant could naintain its counterclaim, either for the actual amount f its alleged damages, or for treble that amount as ttempted to be conferred by that act." R. 36-37.

In other words, the court holds, in the first place, hat the penalties in section 27 should be imposed "if ny person, firm or corporation," whether in or out of entucky, conducting a warehouse within the state of entucky, solicits or persuades or permits, in or out of entucky, to breach his marketing contract by merely ccepting or receiving such member's products," in or ut of Kentucky, "for sale or for auction or for display r sale," at such warehouse in Kentucky, whether be accepted or received, "for sale or for auction or r display for sale," in bulk or hogsheads or original ckage or not; and, further, although the alleged tort **gun** in another state is **"completed"** in Kentucky, yet, ter the tobacco reaches such warehouse, whether in lk or hogsheads or original packages, it is then and ere or thereafter so "accepted or received for **sale** or **auction** or for **display for sale"** merely as a "local- d community"; and, therefore, however comingled acts may be, nevertheless whatever is done in rela- n to it **"appears"** to involve only the question of in- state commerce.

In the second place, the court holds that section 27 is not in conflict with the commercial clause of the Federal Constitution and is therefore valid; because, it is asserted, Congress has relinquished its superior right to regulate interstate commerce with reference to farm products, including tobacco, and for the present has restored the right of the states to do so.

In response to the first proposition attention is called to the opinion of this court in the case of Binderup vs. Pathe Exchange 263 U. S. 309; wherein it is said:

"Does the circumstance that, in the course of the process, the commodity is consigned to a local agency of distribution to be by that agency held until delivery to the lessee in the same state put an end to interstate character of the transaction and **transform** it into one of purely intra-state. We think not. The intermediate delivery to the agency did not end and was not intended to end the movement of the commodity."

In the case of Stafford vs. Wallace, 258 U. S. 516, it is said: "The stockyards are not a place of rest or final destination. Thousands of head of live stock arrive daily by carloads and trainload lots, and must be promptly sold and disposed of and moved out to give place to the constantly flowing traffic that presses behind. The stockyards are but a throat through which the current flows, and the transactions which occur therein are only incident to this current from the

West to the East, and from one state to another. Such transactions cannot be separated from the movement to which they contribute, and necessarily take on its character. **The commission men are essential in making the sales without which the flow of the current would be obstructed,** and this, whether they are made to packers or **dealers.** The **dealers** are **essential** to the **sales** to the stock farmers and feeders. **The sales are not, in this aspect, merely local transactions.** They create a local change of title, it is true, but they do not stop the flow; they merely change the private interests in the subject of the current, not interfering with, but, on the contrary, being indispensable to, its continuity. The origin of the live stock is in the West; its ultimate destination, known to, and intended by, all engaged in the business, is in the Middle West and East, either as meat products or stock for feeding and fattening. This is the definite and well understood course of business. **The stockyards and the sales are necessary factors in the middle of this current of commerce."** Swift & Company vs. United States, 196 U. S. 375.

In the case of Shafer vs. Farmers Grain Co., decided by this court on May 4, 1925, it is said:

"Buying for shipment, and shipping to markets in other states, when conducted as before shown, constitutes interstate commerce_____the buying being as much a part of it as the shipping. We so held in Lemke vs. Farmers Grain Co., 258 U. S. 50, following

and applying the principle of prior cases. Later cases have given effect to the same principle. Stafford vs. Wallace, 258 U. S. 495. Binderup vs. Pathe Exch. 263 U. S. 291.

"Wheat—both with and without dockage—is a legitimate article of commerce and the subject of dealings that are nation wide. The right to buy it for shipment, and to ship it, in interstate commerce, is not a privilege derived from state laws, and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denies to the states by the commerce clause of the Constitution .....The defendants make the contention that we should assume the existence of evils justifying the people of the state in adopting the act. The answer is that there can be no justification for the exercise of a power that is not possessed. If the evils suggested are real, the power of correction does not rest with North Dakota but with Congress, where the Constitution intends that it shall be exercised with impartial regard for the interests of the people of all the states that are affected."

"Again, **tobacco** is a product which has been recognized by custom, as well, as by Acts of Congress as a fit subject for barter and sale and is one of the subjects, **national in character**, which it is within the exclusive power of Congress to regulate." Austin vs. Tenn. 179 U. S. 343; Cook vs. Marshall County, 196 U. S.

261; Notes to 60 L. R. A. 640, 40 L. R. (N. S.) 866.

Moreover, in 5 R. C. L. at page 765, it is said: "The question whether the state police power to the extent of regulation or prohibition can be exerted on certain subjects because it is supposed that the use of the particular commodity is harmful and it is believed that its sale should be regulated or prohibited; has been considered with reference to several subjects, such as intoxicating liquors, cigarettes, and oleomargerine. While the denial of the right of a state to regulate or prohibit the sale of such commodities has been put upon the ground, that they are well recognized articles of commerce and that their sale could not be burdened or prohibited by a state, the controlling reason seems to have been that, notwithstanding objection which might be taken to their use, they have been recognized by the laws of Congress **as legitimate articles of commerce.**" Leizy vs. Harden, 135 U. S. 100.

Furthermore, in 5 R. C. L. at page 770, it is said: "It makes no difference with reference to the interstate character of a sale made on a contract for the purpose of goods which are to be shipped from another state that the goods are to be consigned to the shipper or the agent to whom the order is given and to be delivered to the agent on payment of the purchase price, nor is the transaction deprived of its interstate character by employing any other agent or agency in the delivery of the purchased goods. And the fact that goods ordered

by several purchasers are shipped in bulk to the agent and are delivered by the agent to the respective purchasers **after breaking the bulk,** makes no difference as to the **interstate character** of the sales."

Indeed, the rule is well settled that a statute, like the one in question, purporting to have been enacted to protect the public health, the public morals, the pubic safety ,or to serve the public conveniences, must have some real, or substantial relation thereto and can, in no event, be allowed to operate so as directly to burden interstate commerce or even to **trench** upon these subjects which are within the exclusive power of Congress to regulate. This declaration was first enunciated by Chief Justice Marshall in the great case of Gibbons vs. Odgen 9 Wheat, 1, and its principles have been applied in the case of Hannibal & St. J. vs. Titusville, 153 U. S. 289; M. K. & T. Ry. Co., vs. Haber, 196 U. S. 663; Schollenberger vs. Penn. 171 U. S. 1, Austin vs. Tenn. 179 U. S. 343.

Since the Act in question, under regulations therein prescribed and penalties denounced, forbids warehousemen in all the states of the Union conducting warehouses in Kentucky from shipping their products of Burley Cooperative Growers into Kentucky for sale at public auction over the floors of loose leaf tobacco warehouses, regardless of the nature of the contracts under which the shipments are made, or the manner and condition in which the products are shipped, it fol-

lows that the Act in question directly interferes with the transportation, by land or water from one state to another, which transportation is itself interstate commerce." Phil. & Southern S. S. Co. vs. Penn. 122 U. S. 326.

Indeed, every act of Congress extends to every part of interstate commerce, and to every instrumentality or agency, by which it is carried on; and the full control of subjects committed to its regulation cannot be denied or forfeited by the **commingling** of interstate operations." Minn. Rates Cases, 230 U. S. 362.

In the case of Vance vs. Vandercook Co., 170 U. S. 344, it is held that the power to ship merchandise from one state into another carried with it, as an incident, the right of the receiver of the goods to sell them in original packages, state regulation to the contrary, notwithstanding, unless Congress recognized the power of the state to control the incidential right to sell in original packages.

In the case of Ex parte vs. Jevey, 66 Fed. 959 and Jervey vs. The Carolina, 66 Fed. 1013, it is held that a state statute declaring it to be a misdemeanor, punishable by fine or imprisonment for any person except as provided in the Act to **bring into the state**, by any means or mode of carriage, any liquor or liquors, containing alcohol, is clearly a regulation of commerce."

In the case of Bowman vs. Chicago Ry Co. etc., 125 U. S. 498, it is said: "For the purpose of this

policy, a state legislature has control exclusive of Congress within its territory, of all persons, things and transactions, of strictly internal concern_____it cannot without the consent of Congress, express or implied, regulate commerce between its people and those of other states of the Union in order to effect its end, **however desirable such regulation may be."**

In Henderson vs. Meyer, 92 U. S. 259, it is said: "It is clear, from the nature of our complex form of government that whenever the statute of a state invades the domain of legislation which belongs exclusively to the Congress of the United States, it is **void,** no matter under **what** classes of powers it may fall, or **how closely allied to powers conceded to belong to the states."**

In re: Sanders, 52 Fed. 802, Judge Goff said: "I conclude, that the police power of the state cannot be held to embrace a subject confided exclusively to Congress by the Constitution of the United States. If the **subject matter** of state legislation is included in the exclusive grant of commercial power to Congress, then the state enactment is void, **even if it passed in the exercise of the police power of the state.** The authorities in support of this are, numerous and from them I cite Railroad Company vs. Husen, 95 U. S. 465; Cutcher vs. Kentucky, 141 U .S. 47; Leizy vs. Harden, 135 U. S. 108."

In the case of State vs. Jacobson 80 Ore. 648, it

s held that: "A statute regulating the sale of eggs hipped or imported into the state from any foreign ountry, which requires every person selling or offering for sale any food or drink, the ingredients of which re in part composed of imported eggs shall display in a onspicuous place a sign of stated size and design bearng the words: "Imported Eggs Used Here" does not im at the quality, condition, or purity of the articles of ood but **solely at the place from whence the article is hipped,** and does not call into requisition the police ower of the state."

In the case of Collins vs. New Hamp. 171 U. S. 3, it is said: "It is clearly plain that if the state has ot the power to absolutely **prohibit** the sale of an rticle of commerce like oloemargerine, in its trus state, t has not power to provide that such article shall be **olored,** or rather **discolored,** by adding a foreign subtance to it in the manner described in the statute."

So, likewise ,in the case at bar, if the state has ot power absolutely to prohibit the sale of tobacco, it as not power to provide penalties amounting to proibition of sales thereof except at a particular place and n a particular way.

In response to the second proposition, attention is alled to the opinion of this court in the case of Duplex rinting Press Co. vs. Deering, 254 U. S. 469, wherein t is said: "As to section 6, it seems to us its principle mportance in this discussion is for what does **not** au-

thorize, and for the **limit** it sets to the immunity conferred.

The section assumes the **normal** objects of a labor organization, to be legitimate, and declares that nothing in the Anti-Trust Laws shall be construed to forbid the existence and operation of such organization, or to forbid their members from **lawfully** carrying out their legitimate objects, and that such organization shall not be held in **itself** merely because of its **existence** and **operation,** to be an illegal combination or conspiracy in restraint of trade. But, there is nothing in the section to **exempt** such an **organization** or **its members** from accountability where **it** or **they** depart from it **normal** and **legitimate** objects and engage **in actual combination or conspiracy in restraint of trade.** And by no fair or permissible construction can it be taken as authorizing **any** activity otherwise unlawful, or enablying a normal lawful organization to become a **cloak** for an illegal combination or conspiracy in restraint of trade as defined by the Anti-Trust Laws."

V.

Since The Bingham Act As a Whole Section 25 In Particular Is Repugnant to the Federal Constitution the Answer of Plaintiff In Error Contains Good Defenses and Its Counterclaim Constitutes a Direct Action For Damages.

A.

PARAGRAPH ONE. ESTOPPEL.

In the first paragraph of its answer and counter-claim to which a demurrer was interposed, plaintiff in error alleged facts showing defendant in error to be an unlawful monopoly, trust and combine. Now, if in such a case a recovery cannot be had upon a **contract** sought to be enforced which was made to further the objects of an illegal combination, as held in the case of Continental Wall Paper Co. vs. Lewis Voight, etc., 212 U. S. 227, then upon what principle of law can a recovery be had where damages are sought against a **third** party for inducing the breach of a contract, which, if sued upon would itself have been unenforceable?

The pleadings alleged and it is admitted that both plaintiff in error and defendant in error are engaged in interstate, as well as, intrastate commerce. Hence, "Where the direct and immediate effect of a contract or combination among particular dealers in a commodity to destroy competition between them and others, so that the parties to the contract or combination obtain increased prices for themselves, such contract or combination amounts to a restraint of trade in the commodity at the enhanced price are continually being made. Total suppression of the trade in the commodity is not necessary in order to render the combination one in restraint of trade. It is the effect of the combination in

limiting and restraining the right of each of the members to transact business in the ordinary way, as well as its effect upon the volume or extent of the dealing in the commodity, that is regarded. Addyston Pipe Co., etc., U. S. (1899) L75 U. S. 211; C. N. O. Fuel Co. vs. U. S. 155 Fed. 610; O'Halloran vs. American Sea Breen Slate Co., 207 Fed. 187. In the case of Ford Motor Co. vs. Union Motor Sales Co., 244 Fed. 156, it is said:

"It is the general and well settled rule that a system of contracts between a manufacturer and retail dealers, by which the manufacturer in connection with absolute sales of his product, attempts to control the resale prices for all sales, by all dealers eliminating all competition and fixing the amount which the ultimate purchaser shall pay, amounts to restraint of trade, and is invalid both at common law, and so far as it affects interstate commerce under the Sherman Anti-Trust Act." Miles Medical Co. vs. John D. Park, etc. Co., 220 U. S. 373; U. S. vs. Kellog Toasted Corn Flakes Co., 22 Fed. 725; Knawer vs. U. S. 237 Fed. 8, Monarch; Tobacco Works vs. American Tobacco Co., 165 Fed. 774; Swift vs. U. S. 196 U. S. 375. But, we are not left alone to the citation of cases expounding the efficiency of Federal Anti-Trust laws. Notwithstanding the repeal of the Anti-Trust Act of 1890 by the General Assembly of Kentucky during the same session which it enacted the Bingham Act, there stands the

sturdy oak of a thousand years, the grand old common law, riven but not destroyed, still towering in its strength and beneficience, altho its stalwart companion lies prostrate at its side. Gay vs. Brent, 166 Ky. 883; Commonwealth vs. Hatfield Coal Co., 186 Ky. 411; Love vs. Kozy Theatre Co., 193 Ky. 336,—all loudly acclaim its power for righteousness. To which, alas, some in Kentucky are no longer subject; who have been licensed to afflict others with evils of monopoly worse than all the plagues of Egypt.

Indeed, in the opinion of the Court of Appeals of Kentucky in this case it is said: "We may add to what was said in that opinion that there is no statute in this state, nor was there any when the cause of action herein arose, against pools, trusts and monopolies and by the Clayton Amendment to the Sherman Anti-Trust Act, (38 Stat. 730) agricultural products were expressly excluded from that act; which left, as the only law against such combinations, the common law, **provided it prevailed in this state as to agricultural products after the enactment of the Bingham Act.** It is, however, conceded that it is competent for a Legislature to repeal the common law prevailing in the jurisdiction where it sits, the same as it may repeal a prior statutory enactment, and section 28 of the Bingham Act expressly provided that the organization of the cooperative marketing companies provided for by it shall not be deemed "to be a conspiracy nor a com-

bination in restraint of trade nor an illegal monopoly; nor an attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this state." It is then provided in the same section that.....

"The marketing contracts and agreements between the association and its members and any agreements authorized in this act shall be considered not to be illegal nor in restraint of trade, etc."

It would therefore seem that section 28 of the act expressly repealed any rule of the common law that might prevail in this state militating against the legality of such contracts. **However, if it should be contended that such a provision was itself unconstitutional, it could only be so held upon the ground that it was an unwarranted classification** which the Potter opinion, and many others we might cite, held was untrue."

Nevertheless, it is submitted that the contract in question, under the admitted facts, having been entered into for the purpose of creating a monopoly, pool and trust, is illegal and is against the public policy of Kentucky as to all others than the class to which defendant in error belongs; and, therefore, defendant in error cannot constitutionally avail itself of such arbitrary classification and assert a right to recover damages from plaintiff in error for a breach thereof, so long as the Commerce Clause and the 14th Amendment stand.

Now, in section one of the Bingham Act which is

883 f-l Ky. statutes, its policy is boldly declared to be "to stabilize the marketing of agricultural products." Does the word "stabilize" mean, and, indeed, can it mean anything except that power is thus attempted to be given to organizations created under this Act artificially to do away with the fluctuation of prices arising out of the normal operation of the law of supply and demand? In section 883 f-y Ky. statutes, growers of tobacco in such associations are **exempted** from the provisions of law in conflict with the Bingham Act, namely, the common law and from any and all existing laws applying to agricultural products in the possession of or under the control of the individual producers on delivery of such products to it by its farmer members."

In section 883 f-l Ky. Statutes, there is this further provision: "Any association organized **hereunder** shall be deemed not to be a conspiarcy nor a combination in restraint of trade nor an **illegal** monopoly nor an attempt to lessen competition nor to fix prices arbitrarily or to create a combination or pool in violation of any law of this state; and the marketing contracts and agreements between the association and its members and any agreements authorized in this Act shall be considered not to be illegal, nor in restraint of trade nor contrary to the provisions of **any** statute enacted against pooling or combination." Section 27 has already been adverted to, and other discriminations are also apparent. Thus it will be seen that the Bingham Act fairly bristles

with inequalities. Consequently, do not these inequalities render the Act both in whole and in part repugnant to the 14th Amendment to the Federal Constitution?

Now with respect to the 14th Amendment, in determining the legality of classification for legislative regulation, it is necessary to consider not only the subject to be regulated, but also the character, extent and purpose of the regulation, as well as, the class of persons legally and naturally affected thereby. Hence, the question at once arises whether those belonging to the class legally and naturally affected by the so-called police regulation are contained in the class therein made or whether any are illegally excluded therefrom? For if persons under the same circumstances and conditions are treated **differently** the Act in question does not classify, but arbitrarily **discriminates.**" See Hing vs. Crowley, 113 U. S. 702, Ry. Co. vs. Beckwith, 129 U. S. 26; American Sugar Refining Co. vs. Louisiana, 179 U. S. 89; McFarland vs. American Refining Co., 241 U. S. 79.

In 6 R. C. L. section 396, it is said: "The courts generally are opposed to a recognition of farmers and persons engaged in argricultural pursuits as forming a separate class within the limits allowed by the federal constitution securing to all the equal protection of the laws. Hence, it is that statutes purporting to prohibit the formation of trusts for the purpose of fixing the price or regulating the production of articles of com-

merce, but exempting from their provisions all persons engaged in agriculture and raising live stock, are unconstitutional as class legislation denying the equal protection of the laws **to those not included in the exempted class.**" Connolly vs. Union Sewer Pipe Co., 184 U. S. 540, 22 S. Ct. 431, 46 U. S. (L ed) 479; Brown vs. Jacobs Pharmacy Co., 115 Ga. 429, 41 S. E. 553, 90 A. S. R. 126, 57 L. R. A. 547; see also Davis vs. Mass. 167 U. S. 17 S. Ct. 437, 38 U. S. (L ed) 71; New York, etc., R. Co. vs. Bristol, 151 U. S. 567, 14 S. Ct. 437, 38 U. S. (L ed) 269; Cantina vs. Tillman 54 Fed. 974 Smith 38 Cal. 702; Parks vs. State 159 Ind. 211, 64 N. E. 862, 59 L. R. A. 190; State vs. Bohemier, 96 Me. 257, 52 Atl. 643; State vs. Latham 115 Me. 176, 98 Atl. 578; American Coal Co. vs. Allegany County Comrs. 128 Md. 594, 98 Atl. 143; Com. vs. Abrahams 156 Mass. 57, 30 N. E. 79, People vs. Coolidge 124 Mich. 664; McKinster vs. Sager 163 Ind. 671.

The doctrine in the Connolly case, supra, has recently been invoked and applied by Mr. Chief Justice Taft in the illuminating case of Truax vs. Corrigan, 257 U. S. 335, wherein it is said: "There is the necessary effect of Connolly vs. Union Sewer Pipe Co. 184 U. S. 540, 46 (L ed) 679, 22 Sup. Ct. Rep. 431, where an Anti-Trust Act was held invalid under this same clause because it contained the excepting provision "That it should not apply to agricultural products or

live stock while in the hands of the producer or raiser." That was a stronger case than this, because the whole statute was one dealing with economic policy and was a declaration of mala prohibita that had theretofore been lawful, from which it was strongly argued, that the exception was justified in the interest of agriculture and was a proper exception by permissible classification. Here is a direct invasion of the ordinary business and property rights of a person, unlawful when committed by any one, and remediable because of its otherwise irreparable character by equitable process, **except when committed by ex-employees of the injured person. If this is not a denial of the equal protection of the laws then it is hard to conceive what would be.** To hold it, not to be, would be, to use the expression of Mr. Justice Brewer in Gulf C. & S. F. R. R. Co. vs. Ellis, 165 U. S. 150, 154, 41 (L. ed) 666, 17 Sup. Ct. Rep. 255, to make the guaranty of the equality clause " a rope of sand." See also In re: Opinion of Justices, 211 Mass. 618.

Now, in the case of U. S. vs. American Linseed Oil Co., 262, U. S. 388, it is said. **"THE PRICE OF OIL BECAME MORE STABLE.** Defendants continued with meticulous care actively to carry out the several provisions of the agreement amongst them; and that they intended further to pursue the plan unless restrained is not denied.

The obvious policy, indeed, the declared purpose

of the arrangement was to **submerge** the **competition** theretofore existing amongst the subscribers, and substitute "intelligent competition" or open competition to eliminate "unintelligent selfishness" and establish "100 per cent confidence", **all to the end that the members might stand out from the crowd as substantial coworkers under modern cooperative business methods.**". In American Column & Lumber Co., 257 U. S. 66, (L ed) 284, A. L. R. 1093, 42 Sup. Ct. Rep. 114, we considered a combination of manufacturers got up to effectuate this new combination of confidence and competition and held it within the inhibition of the Sherman Act because of inevitable tendency to destroy real competition as long understood and thereby restrain trade. Our conclusion there cannot be reconciled with the somewhat earlier opinion and judgment of the court below. They are in direct conflict.

The Sherman Act was intended to secure equality of opportunity and to protect the public against evils commonly incident to monopolies and these abnormal contracts and combinations which tend directly to suppress the conflict for advantage called "competition", the play of the contending forces ordinarily engendered by an honest desire for gain. The statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods by agreements or otherwise, to accomplish such purpose. . . . The words "restraint of trade" should

be given a meaning which would not destroy the individual right to contract, and render difficult, if not impossible, any movement of trade in the channels of interstate commerce,—**the free movement of which it was the purpose of the statute to protect.** United States vs. American Tobacco Co., 221 U. S. 106, 179, 180, 55 (L. ed) 663, 694, 31 Sup. 632, Charles A. Ramsay Co. vs. Associated Bill Posters 269 U. S. 501, ante, 368, 43, Sup. Ct. Rep. 167, Federal Trade Commission vs. Sinclair Ref. Co., 261 U. S. 463, ante, 746, 43, Sup. Ct. Rep. 450.

Certain it is that the defendants are associated in a new form of combination and are resorting to methods which are not normal. If, looking at the entire contract by which they are bound together, in the light of what has been done under it, **the court can see that its necessary tendency is to suppress competition in trade between the states,** the combination must be declared unlawful. That such is its tendency we think must be affirmed.

To decide otherwise would be wholly inconsistent with the conclusion reached in American Column & Lumber Co. vs. United States, supra."

In 19 R. C. L. section 21, it is said: "The purpose in all the prohibitions against monopolies and restraint of trade was to preserve the freedom of trade by means of free competition **between the traders themselves,** in order that the public should not be required

to pay exorbitant prices for articles of common use and necessity. It was to prevent any man or set of men, from possessing the power arbitrarily to determine the price at which an article of common use shall be sold. The courts are practically unanimous in holding unlawful all agreements and combinations, **in whatever form or name,** by and between independent and unconnected manufacturers and dealers for the purpose of directly controlling the prices of their commodities, **either by restricting or monopolizing their supply,** or by limitation of production, or by restriction on sales or distribution, or by express agreements to maintain specified prices. A combination to fix the price of an article of prime necessity was a criminal conspiracy at common law, and still is under the Anti-Trust Laws of most of the states. Necessity or beneficient purpose or effect is no justification for a combination to raise prices. **That the price actually fixed is reasonable is no defense."**

And in section 43 thereof it is further said: "Any agreement or combination, which directly operates, not alone upon the manufacturers, but upon the **sale, transportation,** and **delivery** of an article of interstate commerce, by preventing or **restricting** its **purchase, sale** or **exchange** or by **destroying, restricting** or **stifling** free competition therein, **thereby regulates and restrains interstate commerce to that extent, and to the same extent trenches upon the power of the national legislature**

and violates the statute.

And there does not seem to be any doubt that the combinations formed for the purpose of fixing and maintaining arbitrary and non-competitive prices or rates are illegal under the statute. The act does not contemplate that the combination therein made unlawful must be one which shall by its terms **refer** to interstate commerce. **It is enough if its purpose and effort are necessarily to restrain interstate trade.** If it were otherwise, all combinations in restrain of interstate trade **might be so expressed in words as to avoid the statute.** The true test would seem to be, not what the agreement professes, **but what it accomplishes.** The combination must be dealt with in view of the known facts which surround it when it was formed, and which attend it thereafter. To vitiate a combination such as the act of Congress condemns, **it need not be shown that the combination, in fact, results or will result in a total suppression of trade,** or in a complete **monopoly,** but it is only essential to show that, by its necessary operation, **it tends to restrain interstate or international trade or commerce or tends to create a monopoly in such trade or commerce and to deprive the public of the advantages that flow from free competition.** A combination that has obtained a virtual monopoly of interstate trade in a given commodity is clearly forbidden by the act. And **business device** by which a considerable number of competing corporation or growers are weld-

ed into a single corporate entity which controls **practically all** the commerce of the country in a particular branch required for the economical production of a necessity of mankind of such monopoly. Trade and commerce are "monopolized" within the meaning of the Federal Statute, when, as a result of efforts to that end, such power is obtained that a few persons acting together can control rates or prices. **It is not necessary that the power thus obtained should be exercised."**

In view of the foregoing authorities, since it inevitably follows that the Bingham Act is invalid, and, consequently, the contract for inducing a breach of which recovery is sought being null and void, as well as, the section upon which a right of recovery rests, it is submitted that the first paragraph of the answer and counterclaim of plaintiff in error presented a good defense.

B.

PARAGRAPH TWO OF ANSWER AND COUNTERCLAIM

The argument presented and the authorities cited in support of the contention of plaintiff in error with respect to the first paragraph of its answer and counterclaim, render discussion of the contention in the second paragraph unnecessary.

C.

PARAGRAPH THREE CONTAINING COUNTER-

CLAIM OF PLAINNTIFF IN ERROR IS EQUIV-ALENT TO A DIRECT ACTION FOR DADMAGES.

The defendant in error having selected the forum in which to litigate the nature and character of its business, it became incumbent upon plaintiff in error there to present all questions arising out of or connected with conduct of the business of defendant in error of which the transaction in question formed a part; and, consequently, to present not only its defense to the suit, but also to ask for affirmative relief.

Hence, plaintiff in error, having been injured by the method of defendant in error in conducting its business, was compelled to ask for relief asserted in the third paragraph of its answer in the form of a counterclaim; because the admitted facts therein recited conclusively show defendant in error to be a monopoly, trust and combine operating in violation of the Federal Anti-Trust Laws. Clabough vs. Southern Wholesale Growers Association, 181 Fed. 706.

In other words, if the suit of defendant in error for an alleged tort may be likened to a suit for an assault and battery, the counterclaim of appellee may be likened to a claim for damages arising out of a plea of Son Assult Demesne. Slone vs. Slone, 2 Met. 339; Whitlock vs. Redford, 82 Ky. 390; Forbes vs. Cooper, 88 Ky. 285.

In Newmans Pleading and Practice, Vol. 1. section 384 c, it is said: "It may often happen that a petition contains a good cause of action, but has in it one or more allegations sought to be stricken out. In such a case the defense cannot be reached by a demurrer, but by motion to strike out the particular allegations designed. Upon such a motion, altho, the facts as stated may not of themselves show the plaintiff to be entitled to any additional relief beyond what he would be entitled to without them, the court will not strike them out. Hence, on the motion to strike any allegations as irrevalent, the question is presented to the court, whether, in any particular aspect of the case, the fact sought to be stricken out be material to the granting of any relief to which the party may be entitled. And it is hereby remarked that the court will be inclined to discourage motions to strike out, and in doubtful cases, or where the matter objected to its trivial, will overrule the motion."

Now, if upon the authorities cited, section 27 of the Bingham Act is invalid, then defendant in error has no right of action, and the counterclaim of plaintiff in error stands alone as a direct action. In that event, if, for any reason, it should be proper to eliminate from the third paragraph so much of its allegations as invokes damages under the Sherman Anti-Trust Act; yet, there would remain sufficient allegations to enable plaintiff in error to amend and, under the facts stated, invoke dam-

ages pursuant to the provisions of the common law. L. & N. Ry. Co. vs. Pointer, 113 Ky.

For, in 19 R. C. L. section 155, it is said:

"Any person who has been injured in his trade or business by the activities of an unlawful combination for that purpose is now generally held to be entitled to recover damages in an action at law for the loss suffered, both at common law and under Anti-Trust Statutes. Many Anti-Trust Statutes expressly confer a right of action for the full amount of damages sustained in consequence of any violation of the provisions of the act, and a few, following the Sherman Act permit the injured party to recover twofold or threefold the damages by him sustained, including a reasonable attorney fee. Some courts permit such damages to be pleaded by way of counterclaim or set off in an action by a member of the combination for goods sold, but others hold that damages can be recovered only in a direct action. The fact that the plaintiff in an action for damages was formerly a member of the association causing the injury and participated in the adoption of its constitution and by-laws does not affect his right of action when the acts complained of occurred after he ceased to be a member, since he is not in such a case **in pari delicto.**"

In the case of Shoshone Mining Co. vs. Rutter, 177 U. S. 513, it is said:

"And finally it is said that Congress cannot confer

any jurisdiction on the state courts, that they may decline to entertain these adverse suits, and that Congress cannot compel them to do so. But, here again we are met with the fact that Congress has left all controversies in respect to right of possession, not exceeding $2,000 in value, to the state courts. It evidently proceeded upon the supposition which is a rightful one, that, as by the express terms of the United States shall be made in pursuance thereof____shall be the supreme law of the land, and the judges in every state shall be bound thereby, anything in the constitution or laws of any state contrary notwithstanding, no courts, national or state, would decline to carry into effect the acts of Congress. Whether, if a state court should refuse upon these statutes, the matter is one which could be corrected by error in this court, is immaterial. If it shall appear that the state courts decline to entertain such jurisdiction, and that it cannot be enforced upon them, Congress may further legislate. Evidently, thus far in these cases, as in many others, there has been no reason to suppose that any courts of the United States would decline to enforce the laws of the United States or to carry into effect their provisions."

Now, the contention of plaintiff in error is that the practices, purposes, and illegal acts, the commission of which defendant in error admits and which are done under the supposed authority of the Bingham Act, under the provisions of that act a gross discrimination,

repugnant to the Federal Constitution, which repugnancy constitutes a defense to the action, as well as a ground for cross action at least for damages at common law.

For, the counterclaim of plaintiff in error is not a suit in equity to prevent and restrain violations of the Sherman Act; nor does it indirectly attack the existence of defendant in error corporation, but calls in question the **powers** which the corporation has undertaken to exercise by reason of which plaintiff in error has been injured. Therefore, the case at bar is distinguished from the case of Wilder vs. Corn Products Co., 236 U. S. 165, in that the corporation in that case was organized under a constitutional statute; whereas, the corporation in this case was organized under an unconstitutional statute, as the admitted facts show, and, therefore, its contracts for inducing a breach of which plaintiff in error has been sued are **inherently** illegal.

Hence, the elementary rule that courts will not exert their powers to enforce illegal contracts applies to the suit of the defendant in error. The reason why the rule did not apply in the Corn Products case is given by the court as follows: "The **only** suggestion as to the **intrinsic** illegality of the sale results from the averments of the answer as to the offer of a percentage of profits upon the condition of dealing exclusively with the Refining Company for the following year; and the clause to the effect that the goods were bought by

the manufacturing company for its own use, and not for resale. But we can see no ground whatever for holding that the contract for sale was illegal because of these conditions." Manifestly, there is a wide difference between that case and the case at bar.

In the case at bar because the Court of Appeals of Kentucky held it to be correct practice to file the counterclaim it, therefore, considered, the question as to the constitutionality of the Bingham Act both in whole and in part; but rested its disallowance thereof, first, upon the ground that because of its partial repeal, the remedies of the common law available against all others for violations thereof cannot be invoked in Kentucky against those of the class to which defendant in error belongs; and, second, upon the further ground that remedies available against all others for violations of the Sherman Anti-Trust Law, as amended, cannot be invoked herein because defendant in error as one of a favored class has been exempted from the penalties threin provided.

For the reasons heretofore given it is the contention of plaintiff in error that both of these grounds are untenable; and, further, that the judgment of the Court of Appeals of Kentucky is in all respects erroneous and should be reversed. Respectfully submitted,

ALLAN D. COLE,
Counsel for Plaintiff in Error.

J. M. COLLINS, Of Counsel.

APPENDIX

AN ACT authorizing the formation of non-profit, co-operative associations, with or without capital stock, for the purpose of encouraging the orderly marketing of agricultural products through co-operation; defining the various terms used therein; enumerating the activities and powers of such an association; prescribing the rights and privileges of membership; providing for articles of incorporation, declaring what they shall contain, manner of expecting and filing, method of amending same; providing for by-laws and what they may contain; providing for method of election of directors, filling of vacancies; powers and duties of directors; division into election districts; appointment of executive committees and allotment of functions and powers; providing for officers, qualifications, election and functions; regulating issuance of membership certificates or stock and payment therefor; limiting personal liability of members for debts of association; regulating voting power of members and stockholders; authorizing issuance of preferred stock, with or without right to vote; and the retirement thereof providing for removal of officers and directors; providing for referen-

dum to members; providing for a marketing contract; and prescribing remedies for breach of contract, including liquidated damages, fees and all costs; authorizing injunction and general equitable remedies in the event of breach of agreement; stating presumption of control of products by landlords who have signed marketing agreements; providing for annual reports; providing that no provision of law in conflict with this act shall be construed as applying to such associations; providing that legal exemption of agricultural products in the possession of producers shall apply to such products in possession of, or under the control of, such associations; limiting the use of the word "Co-operative" in names for producers' co-operative marketing activities; and prescribing a penalty for violating such inhibition; permitting associations to organize other corporations or to own stock in other corporations; providing for agreements with other co-operative associations in this or other states and stating the purposes or reasons therefor; providing that associations heretofore organized may re-organize hereunder; making it a misdemeanor to induce a member to breach his marketing contract with the association, or spread false reports about it and prescribing a fine for each offense; making such offender liable to the association for a prescribed penalty therefor in a civil suit; providing liability to the association in a penal sum in certain cases for any person who knowingly solicits, persuades

or permits any member of the association to breach his marketing contract; authorizing an injunction against such warehouseman; and providing for payment of all fees and costs; and setting out the reasons for such provisions; providing that no such association shall be deemed a conspiracy or an illegal combination or monopoly or in violation of any law of this State; and providing that marketing contracts shall not be considered illegal; providing that if any section of this act shall be declared unconstitutional, the remainder of the act shall not be thereby affected; providing that the general corporation laws of this State shall apply to such associations, except where inconsistent with express provisions hereof; providing for taxation respecting the association's shares and property; providing fees for filing articles of incorporation and amendments thereto; providing that this act may be hereafter indexed, and cited as "The Bingham Co-operative Marketing Act", and declaring an emergency to exist.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF KENTUCKY:

1. DECLARATION OF POLICY.

(a) In order to promote, foster and encourage the intelligent and orderly marketing of agricultural products through co-operation; and to eliminate speculation and waste; and to make the distribution of agri-

cultural products between producer and consumer as direct as can be efficiently done; and to stabilize the marketing of agricultural products, this Act is passed.

2. DEFINITIONS.

As used in this act.

(a) The term "agricultural products" shall inlude horticultural, viticultural, forestry, dairy, live stock, poultry, bee and any farm products.

(b) The term "member" shall include actual members of associations without capital stock and holders of common stock in associations organized with capital stock.

(c) The term "association" means any corporation organized under this act; and

(d) The term "person" shall include individuals, firms, partnerships, corporations and assocaitions.

Associations organized hereunder shall be deemed "non-profit" inasmuch as they are not organized to make profit for themselves as such, or for their members, as such, but only for their members as producers.

(e) For the purposes of brevity and convenience this Act may be indexed, referred to and cited as "The Bingham Co-operative Marketing Act."

3. WHO MAY ORGANIZE.

Twenty (20) or more persons, a majority of

whom are residents of this State, engaged in the production of agricultural products, may form a non-profit, co-operative association, with or without capital stock, under the provisions of this Act.

4. PURPOSES.

An association may be organized to engage in any activity in connection with the marketing or selling of the agricultural products of its members, or with the harvesting, preserving, drying, processing, canning, packing, grading, storing, handling, shipping or utilization thereof, or the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling or supplying to its members of machinery, equipment or supplies; or in the financing of the above enumerated activities; or in any one or more of the activities specified herein.

5. PRELIMINARY INVESTIGATION.

Every group of persons contemplating the organization of an association under this act is urged to communicate with the Dean of the College of Agriculture of the University of Kentucky, who will inform them whatever a survey of the marketing conditions affecting the commodities proposed to be handled may indicate regarding probable success.

It is here recognized that agriculture is characterized by individual production in contrast to the group

or factory system that characterizes other forms of industrial production; and that the ordinary form of corporate organization permits industrial groups to combine for the purpose of group production and the ensuing group marketing and that the public has an interest in permitting farmers to bring their industry to the high degree of efficiency and merchandising skill evidenced in the manufacturing industries; and that the public interest urgently needs to prevent the migration from the farm to the city in order to keep up farm production and to preserve the agricultural supply of the nation; and that the public interest demands that the farmer be encouraged to attain a superior and more direct system of marketing in the substitution of merchandising for the blind, unscientific and speculative selling of crops; and that for this purpose, the farmers should secure special guidance and instructive data from the Dean of the College of Agriculture of the University of Kentucky.

6. POWERS.

Each associations incorporated under this Act shall have the following powers:

(a) To engage in any activity in connection with the marketing, selling, preserving, harvesting, drying, processing, manufacturing, canning, packing, grading, storing, handling or utilization of any agricultural products produced or delivered to it by its members, or

the manufacturing or marketing of the by-products thereof; or any activity in connection with the purchase, hiring or use by its members of supplies, machinery or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section. No association, however, shall handle the agricultural products of any non-member, except for storage.

(b) To borrow money without limitation as to amount of corporate indebtedness or liability; and to make advances to members.

(c) To act as the agent or representative of any member or members in any of the above mentioned activities.

(d) To purchase or otherwise acquire; and to hold, own, and exercise all rights of ownership in; and to sell, transfer or pledge, or guarantee the payment of dividends or interest on, or the retirement or redemption of, shares of the capital stock or bonds of any corporation or association engaged in any related activity or in the warehousing or handling or marketing of any of the products handled by the association.

(e) To establish reserves and to invest the funds thereof in bonds or in such other property as may be provided in the by-laws.

(f) To buy, hold and exercise all privileges of ownership, over such real or personal property as may

be necessary or convenient for the conduct and operation of any of the business of the association, or incidental thereto.

(g) To do each and every thing necessary, suitable or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the subjects herein enumerated; or conductive to or expedient for the interest or benefit of the association; and to contract accordingly; and in addition to exercise and possess all powers, rights, and privileges necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged; and, in addition, any other rights, powers and privileges granted by the laws of this State to ordinary corporations, except such as are inconsistent with the express provisions of this Act; and to do any such thing anywhere.

7. MEMBERS.

(a) Under the terms and conditions prescribed in the by-laws adopted by it, an association may admit as members, or issue common stock to, persons only engaged in the production of the agricultural products to be handled by or through the association, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent all or part of the crop raised on the leased premises.

(b) If a member of a non-stock association be other than a natural person, such member may be represented by any individual, associate, officer or manager or member thereof, duly authorized in writing.

(c) One association organized hereunder may become a member or stockholder of any other association or associations organized hereunder.

8. ARTICLES OF INCORPORATION.

Each association formed under this act must prepare and file articles of incorporation, setting forth:

(a) The name of the association.

(b) The purposes for which it is formed.

(c) The place where its principal business will be transacted.

(d) The term for which it is to exist, not exceeding fifty (50) years.

(e) The number of directors thereof, which must be not less than five (5) and may be any number in excess thereof; the term of office of such directors; and the names and addresses of those who are to serve as incorporating directors for the first term, or until election and qualifications of their successors.

(f) If organized without capital stock, whether the property rights and interest of each member shall be equal or unequal; and if unequal, the general rule

or rules applicable to all members by which the property rights and interests, respectively, of each member may and shall be determined and fixed; and provision for the admission of new members who shall be entitled to share in the property of the association with the old members, in accordance with such general rule or rules. This provision or paragraph of the articles of incorporation shall not be altered, amended, or repealed except by the written consent or vote of three-fourths of the members.

(g) If organized with capital stock, the amount of such stock and the number of shares into which it is divided and the par value thereof.

The capital stock may be divided into preferred and common stock. If so divided, the articles of incorporation must contain a statement of the number of shares of stock to which preference is granted and the number of shares of stock to which no preference is granted and the nature and definite extent of the preference and privileges granted to each.

The articles must be subscribed by the incorporators and acknowledged by one of them before an officer authorized by the law of this State to take and certify acknowledgments of deeds and conveyances; and shall be filed in accordance with the provision of the general corporation law of this State; and when so filed the said articles of incorporation or certified copies

thereof, shall be received in all the courts of this State and other places, as prima facie evidence of the Facts contained therein and of the due incorporation of such association. A certified copy of the articles of incorporation shall also be filed with the Dean of the College of Agriculture of the University of Kentucky.

9. AMENDMENTS TO ARTICLES OF INCORPORATION.

The articles of incorporation may be altered or amended at any regular meeting or any special meeting called for that purpose. An amendment must first be approved by two-thirds of the directors and then adopted by a vote representing a majority of all the members of the association. Amendments to the articles of incorporation, when so adopted, shall be filed in accordance with the provisions of the general corporation law of this State.

10. BY-LAWS.

Each association incorporated under this Act must, within thirty (30) days after its incorporation, adopt for its government and management, a code of by-laws, not inconsistent with the powers granted by this Act. A majority vote of the members or stockholders, or their written assent, is necessary to adopt such by-laws. Each association, under its by-laws, may provide for any or all of the following matters:

(a) The time, place and manner of calling and conducting its meetings.

(b) The number of stockholders or members constituting a quorum.

(c) The right of members or stockholders to vote by proxy or by mail or both; and the conditions, manner, form and effects of such votes.

(d) The number of directors constituting a quorum.

(e) The qualifications, compensation and duties and term of office of directors and officers; time of their election and the mode and manner of giving notice thereof.

(f) Penalties for violations of the by-laws.

(g) The amount of entrance, organization and membership fees, if any; the manner and method of collection of the same; and the purposes for which they may be used.

(h) The amount which each member or stockholder shall be required to pay annually or from time to time, if at all, to carry on the business of the associaion; the charge, if any, to be paid by each member or stockholders for services rendered by the association to him and the time of payment and the manner of collection; and the marketing contract between the association and its members or stockholders which every

member or stockholder may be required to sign.

(i) The number and qualification of members or stockholders of the association and the conditions precedent to membership or ownership of common stock; the method, time and manner of permitting members to withdraw or the holders of common stock to transfer their stock; the manner of assignment and transfer of the interest of members and of the shares of common stock; the conditions upon which and time when membership of any member shall cease; the automatic suspension of the rights of a member when he ceases to be eligible to membership in the association; and the mode, manner and effect of the expulsion of a member the manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or stockholder, or upon the expulsion of a member or forfeiture of his membership, or, at the option of the association, the purchase at a price fixed by conclusive appraisal by the Board of Directors. In case of the withdrawal or expulsion of a member, the Board of Directors shall equitably and conclusively appraise his property interests in the association and shall fix the amount thereof in money, which shall be paid to him within one year after such expulsion or withdrawal.

11. GENERAL AND SPECIAL MEETINGS—HOW CALLED.

In its by-laws, each association shall provide for

one or more regular meetings annually. The Board of Directors shall have the right to call a special meeting at any time; and ten per cent of the members or stockholders may file a petition stating the specific business to be brought before the association and demand a special meeting at any time. Such meeting must thereupon be called by the directors. Notice of all meetings, together with a statement of the purposes thereof, shall be mailed to each member at least ten days prior to the meeting; provided, however, that the by-laws may require instead that such notice may be given by publication in a newspaper of general circulation, published at the principal place of business of the association.

12. DIRECTORS—ELECTION.

The affairs of the association shall be managed by a board of not less than five directors, elected by the members or stockholders from their own number. The by-laws may provide that the territory in which the association has members shall be divided into districts and that the directors shall be elected according to such districts, either directly or by district delegates elected by the members in that district. In such a case the by-laws shall specify the number of directors to be elected by each district, the manner and method of reapportioning the directors and of redistricting the territory covered by the association. The by-laws may

provide that primary elections shall be held in each district to elect the directors apportioned to such districts and that the reslut of all such primary elections may be ratified by the next regular meeting of the association or may be considered final as to the association. The by-laws may provide that one or more directors may be appointed by any public official or commission or by the other directors selected by the members or their delegates. Such directors shall represent primarily the interest of the general public in such associations. The directors or directors so appointed need not be members or stockholders of the association; but shall have the same powers and rights as other directors. Such directors shall not number more than one-fifth of the entire number of directors.

An assocaition may provide a fair remuneration for the time actually spent by its officers and directors in its service and for the service of the members of its executive committee. No director, during the term of his office, shall be a party to a contract for profit with the association differing in any way from the business relations accorded regular members or holders of common stock of the association or others, or differing from terms generally current in that district.

The by-laws may provide for an executive committee and may allot to such committee all the functions and powers of the board of directors, subject to the general direction and control of the board.

When a vacancy on the board of directors occurs other than by expiration of term, the remaining members of the board, by a majority vote, shall fill the vacancy, unless the by-laws provide for an election of directors, by district. In such a case the board of directors shall immediately call a special meeting of the members or stockholders in that district to fill the vacancy.

13. ELECTION OF OFFICERS

The directors shall elect from their number a president and one or more vice presidents. They shall also elect a secretary and a treasurer, who need not be directors or members of the association; and they may combine the two latter offices and designate the combined office as secretary-treasurer, or unite both functions and titles in one person. The treasurer may be a bank or any depository, and as such, shall not be considered as an officer, but as a function, of the board of directors. In such case, the secretary shall perform the usual accounting duties of the treasurer, excepting that the funds shall be deposited only as and where authorized by the board of directors.

14.—STOCK — MEMBERSHIP CERTIFICATE — WHEN ISSUED — VOTING — LIABILITY — LIMITATIONS ON TRANSFER AND OWNERSHIP.

When a member of an assoiation established with-

out capital stock has paid his membership fee in full, he shall receive a certificate of membership.

No association shall issue stock to a member until it has been fully paid for. The promissory notes of the members may be accepted by the association as full or partial payment. The association shall hold the stock as security for the payment of the note; but such retention as security shall not affect the member's right to vote.

No member shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the capital stock, including any unpaid balance on any promissory notes given in payment thereof.

No stockholder of a co-operative association shall own more than one-twentieth (1-20) of the common stock of the association; and an association, in its by-laws, may limit the amount of common stock which one member may own to any amount less than one-twentieth (1-20) of the common stock.

No member or stockholder shall be entitled to more than one vote, regardless of the number of shares of common stock owned by him.

Any association organized with stock under this act may issue preferred stock, with or without the right to vote. Such stock may be redeemable or retirable by the association on such terms and conditions as may be

provided for by the articles of incorporation and printed on the face of the certificate.

The by-laws shall prohibit the transfer of the common stock of the associations to persons not engaged in the production of the agricultural products handled by the association; and such restriction must be printed upon every certificate of stock subject thereto.

The association may, at any time, as specified in the by-laws, except when the debts of the association exceed fifty (50) per cent of the assets thereof, buy in or purchase its common stock at the book value thereof, as conclusively determined by the board of directors, and pay for it in cash within one (1) year thereafter.

15. REMOVAL OF OFFICER OR DIRECTOR.

Any member may bring charges against an officer or director by filing them in writing with the secretary of the association, together with a petition signed by five per cent of the members, requesting the removal of the officer or director in question. The removal shall be voted upon at the next regular or special meeting of the association and, by a vote of a majority of the members, the association may remove the officer or director and fill the vacancy. The director or officer, against whom such charges have been brought, shall be informed in writing of the charges previous to the meeting and shall have an opportunity at the meeting

to be heard in person or by counsel and to present witnesses; and the person or persons bringing the charges against him shall have the same opportunity.

In case the by-laws provide for election of directors by districts with primary elections in each district, then the petition for removal of a director must be signed by twenty per cent of the members residing in the district from which he was elected. The board of directors must call a special meeting of the members residing in that district to consider the removal of the director; and by a vote of the majority of the members of that district, the director in question shall be removed from office.

16. REFERENDUM.

Upon demand of one-third of the entire board of directors, any matter that has been approved or passed by the board must be referred to the entire membership or the stockholders for decision at the next special or regular meeting; provided, however, that a special meeting may be called for the purpose.

17. MARKETING CONTRACT.

The association and its members may make and execute, marketing contracts, requiring the members to sell, for any period of time, not over ten years, all or any specified part of their agricultural products or specified part of their agricultural products or specified

commodities exclusively to or through the assocaition, or any facilities to be created by the association. If they contract a sale to the association, it shall be conclusively held that title to the product passes absolutely and unreservedly, except for recorded liens, to the association upon delivery; or at any other specified time if expressly and definitely agreed in the said contract. The contract may provide that the association may sell or re-sell the products delivered by its members, with or without taking title thereto; and pay over to its members the resale price after deducting all necessary selling, overhead and other costs and expenses, including interest on preferred stock, not exceeding eight (8) per cent per annum, and reserves for retiring the stock, if any; and other proper reserves; and interest not exceeding eight (8) per cent per annum upon common stock.

18. REMEDIES FOR BREACH OF CONTRACT.

The by-laws or the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses and fees, in case any action is brought upon the contract by the association; and any such provisions shall be

valid and enforceable in the court of this State; and such clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties.

(b) In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract and to a decree of specific performance thereof. Pending the adjudication of such an action and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary injunction against the member.

(c) In any action upon such marketing agreements, it shall be conclusively presumed that a landowner or landlord or lessor is able to control the delivery of products produced on his land by tenants or others whose tenancy or possession or work on such land or the terms of whose tenacy or possession or labor thereon were created or changed after execution by the landowner or landlord or lessor, of such a marketing agreement; and in such actions, the foregoing remedies for non-delivery or breach shall lie and be enforceable against such landowner, landlord or lessor.

19. PURCHASING BUSINESS OF OTHER ASSOCIATIONS, PERSONS, FIRMS OR CORPORA-

TIONS—PAYMENT—STOCK ISSUED.

Whenever an association, organized hereunder with preferred capital stock shall purchase the stock or any property or any interest in any property of any person, firm or corporation or association, it may discharge the obligations so incurred, wholly or in part, by exchanging for the acquired interest, shares of its preferred capital stock to an amount which at par value would equal the fair market value of the stock or interest so purchased, as determined by the board of directors. In that case the transfer to the association of the stock or interest purchased shall be equivalent to payment in cash for the shares of stock issued.

20. ANNUAL REPORTS.

Each association formed under this act shall prepare and make out an annual report on forms to be furnished by the Dean of the College of Agriculture of the University of Kentucky, containing the name of the association; its principal place of business; and a general statement of its business operations during the fiscal year, showing the amount of capital stock paid up and the number of stockholders of a stock association or the number of members and amount of membership fees received, if a non-stock association; the total expenses of operations; the amount of its indebtedness or liabilities, and its balance sheets.

21. CONFLICTING LAWS NOT TO APPLY.

Any provisions of law which are in conflict with this Act shall not be construed as applying to the associations herein provided for. Any exemptions under any and all existing laws applying to agricultural products in the possession or under the control of the individual producer, shall apply similarly and completely to such products delivered by its farmer members, in the possession or under the control of the association.

22. LIMITATION OF THE USE OF TERM "CO-OPERATIVE".

No person, firm, corporation or association, hereafter organized or doing business in this State, shall be entitled to use the word "co-operative" as part of its corporate or other business name or title for producers' co-operative marketing activities, unless it has complied with the provisions of this act.

Any person, firm, corporation or association now organized and existing, or doing a producers' co-operative marketing business in this State and embodying the word "co-operative" as part of its corporate or other business name or title, and which is not organized in compliance with the provisions of this act, must, within six months from the date at which this act goes into effect, eliminate the word "co-operative" from its said corporate or other business name or title.

23. INTEREST IN OTHER CORPORATIONS OR ASSOCIATIONS.

An association may organize, form, operate, own, control, have an interest in, own stock of, or be a member of any other corporation or corporations, with or without capital stock, and engaged in preserving, drying, processing, canning, packing, storing, handling, shipping, utilizing, manufacturing, marketing or selling of the agricultural products handled by the association, or the by-products thereof.

If such corporations are warehousing corporations, they may issue legal warehouse receipts to the association against the commodities delivered by it, or to any other person and such legal warehouse receipts shall be considered as adequate collateral to the extent of the usual and current value of the commodity represented thereby. In case such warehouse is licensed or licensed and bonded under the laws of this State or the United States, its warehouse receipts delivered to the association on commodities of the association or its members, or delivered by the association or its members, shall not be challenged or discriminated against because of ownership or control, wholly or in part, by the association.

24. CONTRACTS AND AGREEMENTS WITH OTHER ASSOCIATIONS.

Any association, may, upon resolution adopted by

its board of directors, enter into all necessary and proper contracts and agreements and make all necessary and proper stipulataions, agreements and contracts and arrangements with any other co-operative corporation, association or associations formed in this or any other State, for the co-operative and more economical carrying on of its business or any part or parts thereof. Any two or more associations may, by agreement between them, unite in employing and using or may separately employ and use the same personnel, methods, means and agencies for carrying on and conducting their respective businesses.

25. ASSOCIATIONS HERETOFORE ORGANIZED MAY ADOPT THE PROVISION OF THIS ACT.

Any corporation or association, organized under previously existing statutes, may, by a majority vote of its stockholders or members, be brought under the provisions of this act by limiting its membership and adopting the other restrictions as provided herein. It shall make out in duplicate a statement signed and sworn to by its directors to the effect that the corporation or association has, by a majority vote of the stockholders or members, decided to accept the benefits and be bound by the provisions of this act and has authorized all changes accordingly. Articles of incorporation shall be filed as required in Section 8, except

that they shall be signed by the members of the then board of directors. The filing fee shall be the same as for filing an amendment to articles of incorporation.

(a) Where any association may be incorporated under this act, all contracts heretofore made by or on behalf of same by the promoters thereof in anticipation of such association becoming incorporated under the laws of this State, whether such contracts be made by or in the name of some corporation organized elsewhere and when same would have been valid if entered into subsequent to the passage of this act, are hereby validated as if made after the passage of this act.

26. MISDEMEANOR TO INDUCE BREACH OF MARKETING CONNTRACT OF C-OPERATIVE ASSOCIATION — SPREADING FALSE REPORTS ABOUT THE FINANCES OR MANAGEMENT THEREOF.

Any person or persons or any corporation whose officers or employes knowingly induced or attempt to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association, to who maliciously and knowingly spreads false reports about the finances or management thereof, shall be guilty of a misdemeanor and be subject to a fine of not less than one hundred ($100.00) dollars and not more than one thousand

($1,000) dollars for each such offense; and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred ($500) dollars for each such offense.

27. WAREHOUSEMEN LIABLE FOR DAMAGE FOR ENCOURAGING OR PERMITTING DELIVERY OF PRODUCTS IN VIOLATION OF MARKETING AGREEMENTS.

Any person, firm or corporation conducting a warehouse within the State of Kentucky who solicits or persuades or permits any member of any association organized hereunder to breach his marketing contract with the association by accepting or receiving such member's products for sale or for auction or for display for sale, contrary to the terms of any marketing agreement of which said person or any member of the said firm or any active officer or manager of the said corporation has knowledge or notice, shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred (500) dollars for each such offense; and such association shall be entitled to an injunction against such warehouseman to prevent further breaches and a multiplicity of actions thereon. In addition, said warehouseman shall pay to the association a reasonable attorney's fee and all costs involved in any such litigation or proceedings at law.

This section is enacted in order to prevent a recurrence or outbreak of violence and to give marketing associations an adequate remedy in the courts against those who encourage violations of co-operative contracts.

28. ASSOCIATIONS ARE NOT IN RESTRAINT OF TRADE.

Any association organized hereunder shall be deemed not to be a conspiracy nor a combination in restraint of trade nor an illegal monopoly; nor an attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this State; and the marketing contracts and agreements between the association and its members and any agreements authorized in this act shall be considered not to be illegal nor in restraint of trade nor contrary to the provisions of any statute enacted against pooling or combinations.

29. CONSTITUTIONALITY.

If any section of this act shall be declared unconstitutional for any reason, the remainder of this act shall not be affected thereby.

30. APPLICATION OF GENERAL CORPORATION LAWS.

The provisions of the general corporation laws of

this State and all powers and rights thereunder, shall apply to the associations organized hereunder, except where such provisions are in conflict with or inconsistent with the express provisions of this Act.

31. TAXATION.

The shares of corporations organized under this act shall be taxable as against the owner thereof of the period of assessment of other personal property for taxation in this State.

Such shares will represent in the aggregate all the property held or owned by such corporation, and when taxed as against the individual owner, all of the properey in the name of said association will thereby be taxed.

Under existing laws, crops grown in the year of assessment are exempt from tax whilst owned by the producer. So much of the value of each share of said stock as may represent the owner's proposition of crops grown by him and delivered to the association as herein provided, shall be exempt from taxation, inasmuch as it is the same thing exempted now by the constitution and laws of this State to such grower.

32. FILING FEES.

For filing Articles of Incorporation, an Association organized hereunder shall pay Ten ($10) Dollars;

and for filing an amendment to the Articles, Two and 50-100 ($2.50) Dollars.

33. WHEREAS, the agricultural interests of the State are of the utmost importance to the people of Kentucky; and

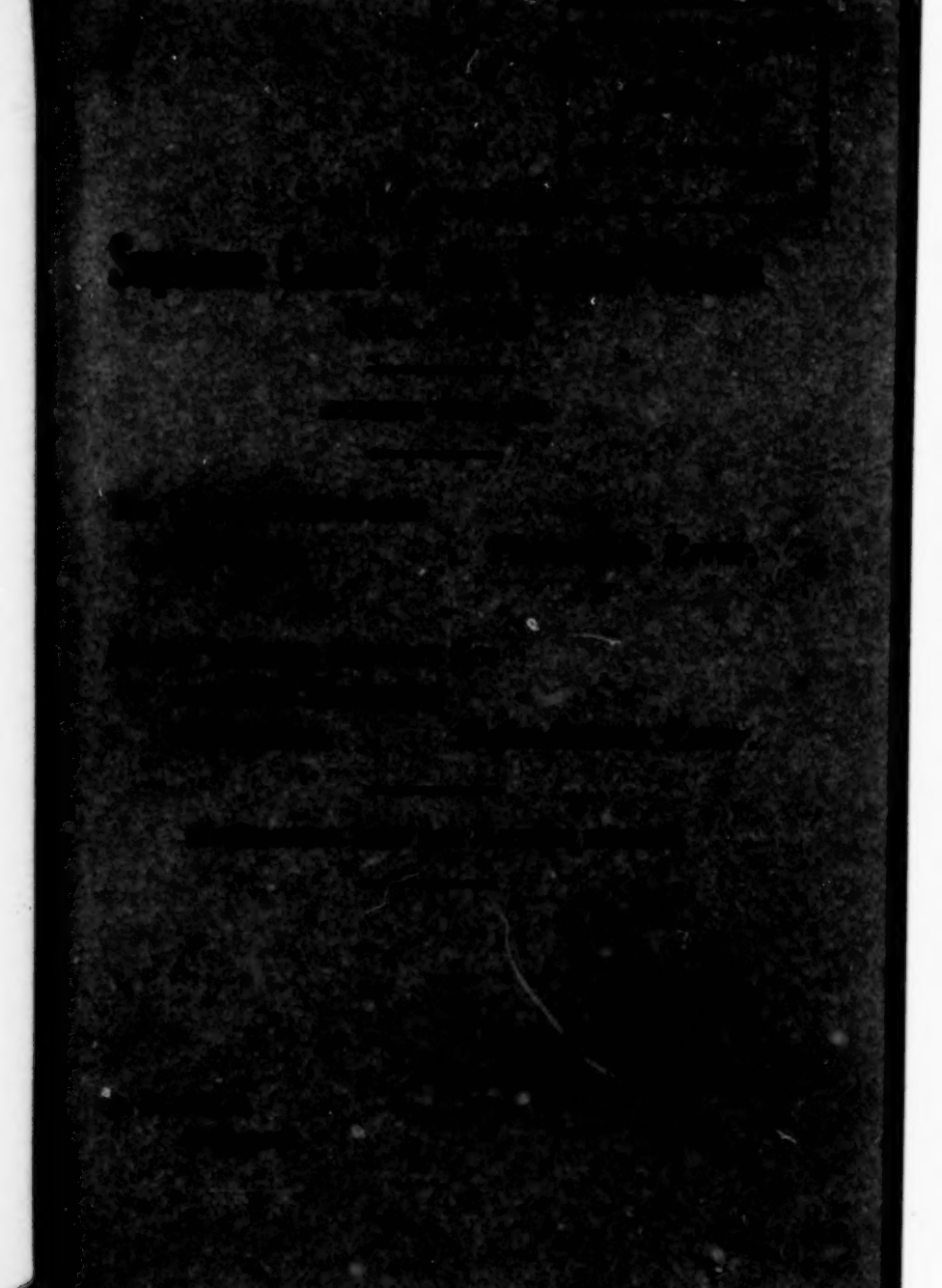
Whereas, a demoralized condition of the farming interests of the State exists, injuriously affecting all other business; and

Whereas, the highest interest of the State generally, demand immediate relief; and

Whereas, this Act is designed and intended to afford such relief,

Therefore, an emergency is declared to exist and this Act shall become effective immediately upon its passage and approval as required by law.

Approved January 10, 1922.



IN THE

Supreme Court of the United States

No. 159

OCTOBER TERM, 1926

The Liberty Warehouse Company, ... *Plaintiff in Error,*

vs.

Burley Tobacco Growers Co-operative Marketing Association, . . *Defendant in Error.*

SUPPLEMENTAL BRIEF FOR PLAINTIFF IN ERROR

I

Defendant in error, the Burley Tobacco Growers Co-operative Marketing Association is an organization, and a trust and monopoly, operating in contravention to the principles of the common law and in violation of the Fifth and Fourteenth Amendment to the Constitution of the United States and the Sherman

Anti-Trust Act and Sections 1, 59 and 198 of the Constitution of the State of Kentucky.

MAY IT PLEASE THE COURT:—

The law governing trusts and monopolies, and organizations in restraint of trade, has been frequently enunciated by this court, and the principles are fully discussed and the law clearly set forth in the following cases, viz:

Standard Oil Co. v. U. S., 221 U. S. 1; 31 S. Ct. 502, 513.

"1 That by the common law, monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public. 2. That as to necessaries of life, the freedom of the individual to deal was restricted where the nature and character of the dealing was such as to engender the presumption of intent to bring about at least one of the injuries which it was deemed would result from monopoly,—that is, an undue enhancement of price. 3. That to protect the freedom of contract of the individual, not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his trade or business was void. And that at common law the evils consequent upon engrossing, etc., caused those things to be treated as coming within monopoly and sometimes to be called monopoly, and the same considerations caused monopoly, because of its operation and effect, to be brought within and spoken of generally as impeding the due course of, or being

in restraint of, trade."

U. S. v. American Tobacco Company, 221 U. S. 106; 31 S. Ct. 632, 648.

"Coming, then, to apply to the case before us the act as interpreted in the Standard Oil and previous cases, all the difficulties suggested by the mere form in which the assailed transactions are clothed become of no moment. This follows because, although it was held in the Standard Oil Case that, giving to the statute a reasonable construction, the words 'restraint of trade' did not embrace all those normal and usual contracts essential to individual freedom, and the right to make which was necessary in order that the course of trade might be free, yet, as a result of the reasonable construction which was affixed to the statute, it was pointed out that the generic designation of the 1st and 2nd sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed."

U. S. v. Patton, 226 U. S. 525, 33 S. Ct. 441: (Syllabus 3)

"A conspiracy to run a corner in the available supply of a stable commodity, such as cotton, normally a subject of inter-state trade and commerce, to be accomplished by purchases for future delivery, coupled with a withholding from sale for a limited time, thereby enhancing artificially its price to all buyers throughout the country, is within the terms of the Anti-Trust Act of July 2, 1890, Art. 1, which makes it a criminal of-

fense to engage in a conspiracy in restraint of interstate commerce, since by its necessary operation it will directly and materially impede and burden such commerce."

In Barbier v. Conley, 113 U. S. 27, 31; 5 S. Ct. 357, 359:

"The Fourteenth Amendment, in declaring that no state 'shall deprive any person of life, liberty or property without due process of law, nor to deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their person and property, the prevention and redress of wrongs and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

In Reagan v. Farmers Loan & T. Co., 14 S. Ct. 1055:

"The equal protection of the laws which, by the

Fourteenth Amendment**no state can deny to the individual,** forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held."

Com. v. International Harvester Co., 131 Ky. 551, 115 S. W. 703: "A statute which when construed according to the canons of statutory construction **confers the right on one class of citizens to do an act made a criminal offense if done by any other class,** conflicts with the Fourteenth Amendment of the Federal Constitution."

II

The facts in this case bring it squarely within the principles above enunciated, and show conclusively that it is operating in derogation of these principles.

As a demurrer to plaintiff in error's Amended Answer was sustained, the question comes up directly upon the facts alleged in the Amended Answer, which are as follows: —

The defendant in error operating under the Bingham Co-operative Marketing Act was "organized and conducted for the express purpose of unlawfully and contrary to the common law creating and carrying out restrictions in trade, to-wit, in the trade of buying, selling and otherwise dealing in certain articles of merchandise, to-wit: Various kinds and grades of tobacco and also for the express purpose of unlawfully and contrary to the common law limiting the production of said articles of merchandise, and enhancing the marketing prices thereof, under the guise of stabilizing prices, and also for the express purpose of unlawfully and contrary to the common law preventing competition in the making and transporting, sale and purchase of said articles of commerce under the guise of stabilizing prices, also for the express purpose of fixing standards and figures whereby the prices of said articles of merchandise intended for sale, use and consumption in this state should be controlled and established under the guise of stabilizing prices": and "that in accordance with the provisions of said Act, plaintiff corporation was organized by various growers of tobacco in Kentucky and Tennessee and the states adjoining Kentucky, and that a large number of citizens of Kentucky engaged in growing tobacco to the extent of not less than 75% have become members of said Association and Under said Bingham Act plaintiff is given the right artificially to fix the prices of tobacco under the guise of stabilizing the marketing of agricultural products

and the right to purchase or otherwise acquire and to hold and own and exercise all the rights of ownership in the warehousing or handling or marketing of

tobacco handled by said Association ..... and its constituent members have entered into a conspiracy to cut out temporarily the growing of tobacco and to limit the production of said articles of merchandise and artificially to raise the marketing price thereof ..... and the making and entering into and carrying out of the certain contract set forth in plaintiff's petition, and by concert of action and by means of said corporation, bound themselves not to sell, dispose of or transport said articles of commerce below certain common standards and figures of prices in excess of the true market value thereof, and whereby they have so agreed to keep the price of said articles of commerce at certain fixed or graduated figures, and whereby they have established certain settled prices of such articles of commerce between themselves and others under the guise of stabilizing prices so as to preclude and prevent unrestricted competition among themselves and others in the sale and transportation of said articles of commerce, both within Kentucky and between it and other states of the Federal Union as well as within them."

These allegations, of course, must be taken as true, and if there were any question about these facts, they are conclusively substantiated by the admissions in brief for defendant in error as follows:

Page 22 brief of defendant in error (opin. in Tenn. ex rel v. Burley Assn.) Through subsidiary corporation issuing 8% preferred stock the Association was able **to acquire 124 of the 126 warehouses in the Burley Tobacco District of Kentucky.** That since the Association has been organized it **has raised the price of to-**

bacco. It was estimated by Judge Bingham that during its first year of operation, the Association did $50,000,000 worth of business and **increased the profits of its members $40,000,000."** (Page 24) "The business of raising tobacco has been concentrated in the hands of a few persons. **More than 100,000 growers are in the pool but one fourth of all the growers are outside the pool.".** (Page 30) "The price of tobacco received by the farmer has increased from the low levels of 12 and 13 cents of 1921 prior to the formation of the defendant in error to approximately 20 cents a pound." (Page 34) "This adjustment could not be made by a single farmer, nor by a local associations or even groups of locals. But it could be made,—and could only be made,—by farmers organized on a unit basis **and certain of controlling the sale** of a large percentage of the commodity. The best evidence as to the satisfactory and successful work of the Association is the increase from year to year in the number of farmers who have become members." (Page 50) "It is sometimes necessary for the co-operative associations to **carry over the surplus** of a crop of one year until such surplus can be sold at a reasonable price." (Page 39) "Prior to about 1916 co-operative marketing was mainly confined to small localized units dealing with the products of a particular locality and not with the **entire commodity.** The principle of commodity co-operation is of recent development."

The foregoing facts and admissions, we respectfully submit, conclusively bring this case within the prin-

ciples set out in the foregoing holdings of this court.

In the brief of the defendant in error much is said, and often reiterated, of what is termed the standard co-operating marketing act with reference to the many things which it is claimed the act would not permit such an association to do. Let us look at the other side and get a grasp of what is permitted to be done by such associations. The acts of all the states are practically the same and were, doubtless, drawn under the same legal advice. Under Section 6 of the Kentucky Act, it will be observed that the powers given such associations are almost unlimited. Under Section 7 (c) one association may become the part of any other association. Under Section 8 (e) the association may be operated by five directors. Under Section 10, it may make any by-law it sees fit "not inconsistent with the powers granted by this Act"; and specifically (i) it may determine "the mode, manner and effect of the expulsion of a member; the manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or stockholder or upon the expulsion of a member of forfeiture of his membership, or, **at the option of the Association,** and purchase at a price fixed by **conclusive appraisal** by the Board of Directors. In case of the withdrawal or expulsion of a member , the Board of Directors shall equitably and conclusively appraise his interest in the Association and **shall fix the amount thereof in money, which shall be paid to him within one year** after such expulsion or withdrawal. Under Section 14 "the association may at any time, as specified in the by-laws, except when the debts of the association exceed

50% of the assets thereof, buy in or purchase its common stock at the book value thereof **as conclusively determined by the Board of Directors** and pay for it in cash within one year thereafter." Under Section 18 (a) it may fix liquidated damages in any amount including all costs and fees and (b) enforce its claim by all the extraordinary remedies of the law. Under Section 24, it may enter into agreements with other similar associations and **operate with the same personnel, methods, means and agencies.** Under Sections 26 and 27, it is given such unusual and extreme powers of coercion as were never vested at common law in the King, even in the palmiest days of his royal prerogatives.

This Act is evidently designed to create, and to sustain by arbitrary legislation, an all-embracing structure of which five directors constitute the key-stone and which is empowered to exercise an absolute control over the entire tobacco crop and ultimately by mergers and consolidations, which are provided for in the Act, completely dominate practically the entire farm production of the United States.

One would look for a long time for a more ingenuous,—and perhaps we should say, a more dangerous piece of legislation —than this. It is mere sophism, we respectfully submit, to say that it has no stockholders and makes no profits. Would the Standard Oil Company have been less a monopoly if one share of its stock belonged to every oil producer; or the American Tobacco Company less so if one share of its stock was owned by every grower of tobacco? It is admitted that

in the first year of the operation of this organization it made a profit of $40,000,000, although the entire product handled was only valued at $50,000,000, and this not in buying and selling in the usual manner of commercial transactions, but by a single turn-over. Tobacco advanced from 12 to 20 cents per pound. Is this stabilization or enhancement? With millions of pounds of tobacco of the 1923, 1924 and 1925 crops now in the hands of this organization, "stabilization" is evidently regarded as meaning "to advance," and "fluctuate" regarded as meaning "to decline."

All other corporations or aggregations of capital which have fallen under the condemnation of the laws against trusts and monopolies have otherwise operated under the general laws of the land, but this organization has had created a law unto itself. No one can come in its way or cross its purposes without falling a victim to the pains and penalties of arbitrary legislative acts. Under the futile hypothesis,—so often reiterated in the brief of defendant in error,—that the legislation of the various states had changed the public policy of the whole country by adopting the co-operative marketing acts, its promoters evidently felt that they were constructing a raft on which they could placidly float through the principles of the Federal Constitution. But if the Legislature of Kentucky should pass a law denying the right of private ownership of property, as has recently been done in Russia and Mexico, and declaring its acts to be the public policy of the State, would such an Act override the provisions of the Fourteenth Amendment and other provisions of the Constitution of

the United States,—Certainly not. The law of the land, the law of nature, and the sentiment of the people are now and have always been against trusts and aggregations of capital and concentrations of power which would militate against the rights, privileges and immunities of the individual, and this is the first law, we respectfully submit, which has ever gone on the statute books of these various states for the express purpose of fostering, promoting and sustaining a trust.

The great United States Steel Company or the Standard Oil Company, with all the extreme odium which has been held against them because of their supposed dominating methods, has never yet been even accused of trying to induce a legislature to pass a law to imprison the village black-smith for selling a broken horse-shoe or to punish the penniless for using a tallow dip.

III

Sections 26 and 27 of the Bingham Co-operative Marketing Act Is class legislation and violative of the provisions of the Fourteenth Amendment to the Federal Constitution, and of Sections 1 and 59 of the Constitution of Kentucky.

Let us see how this law operates in a concrete case. Kealman, whose crop was involved in this case, joined the Association,—whether induced to do so by promises of a dollar a pound for his tobacco or threats of personal violence, it matters not. He produced 2,-

000 pounds of tobacco in 1923. His neighbor Brown did not join the Association but sold his tobacco to his landlord. Kealman sold his tobacco at the warehouse of the plaintiff in error. So did Brown on the same day. Both crops brought the prevailing market price, let us say twenty cents per pound. The Association mulcted Kealman and fixed the sum of five cents per pound of $100.00, 25% of the proceeds of his crop, which it doubtless collected as Kealman's 1922 crop was still in its hands. It recovered a fixed penalty of $500.00 from plaintiff in error with costs and attorney's fees. It, therefore, received $600.00 net from the alleged breach of a contract involving $400.00 worth of ordinary merchandise. And what did it lose by the alleged breach? It could not have lost anything. It was obligated to pay to Kealman the entire proceeds of his crop less expenses. If there is anything in the fulsome arguments of defendant in error, it was Kealman and Kealman only who did or could have lost by the transaction. Again, if Kealman's crop brought only $100.-00, defendant in error under the fixed penalty would have gotten it all, and also gotten the $500.00 penalty from plaintiff in error.

Now, Brown and Kealman are both citizens of the United States, both tenant farmers and cultivated their crops in 1923 in adjoining fields. The two crops were similar and both were sold on the same market at the same time and brought the same price. Both breached their contracts. Brown had sold his crop to his landlord at twenty cents per pound,yet the landlord can recover nothing more than nominal damages from Brown be-

cause he has lost nothing and he has no law by which he can penalize Brown, or mulct the warehouse company. Is that law which gives to the marketing association penalties to the amount of $600.00 for failure to deliver $400.00 worth of ordinary merchandise under a contract whereby it could in no event have lost anything, which takes from the warehouse company $500.-00 for selling Healman's tobacco and nothing for selling Brown's, altho the company's acts in both cases were absolutely identical, which gave to the landlord a right to recover from Brown only what he lost, and mulcted Kealman in a fixed sum, regardless of the kind or quality of his crop, such a law as conforms to the provisions of the 14th Amendment? Where such results can follow, we respectfully submit citizens are deprived of the equal protection of the law and the protection of equal laws.

This court in the case of Truax v. Corrigan, 257 U. S. 312, 42 S. Ct. 124, and the cases therein cited, has clearly laid down the principles which govern in this case. In that case, the court also definitely settled the right of this court to pass upon the questions raised in this case and held further that the Clayton Act and the Volstead-Carter Act had no application in a case like this, as the rights of which the plaintiff in error has been deprived are guaranteed to it under constitutional provisions. In the Truax case this court stated the law as follows:—

Pages 126, 129, 132. "The ruling of the Supreme Court proceeded, first, on the assumption that

the gravament of th ecomplaint was that the defendants were merely inducing patrons to cease their patronage by making public the fact of the dispute and the attitude of plaintiffs in it; and, secondly, on the proposition that, while good will is a valuable factor in business success, "no man has a vested right in the esteem of the public,"—that, while the plaintiff had a clear right to refuse the demand of the union, the union had a right to advertise the cause of the strike. The court held that the purpose of paragraph 1464 was to recognize the rights of workmen on a strike to use peaceable means to accomplish the lawful ends for which the strike was called; that picketing, if peaceably carried on for a lawful purpose, was no violation of the rights of the person whose place of business was picketed; that prior to the enactment of paragraph 1464, picketing was unlawful in Arizona, because it was presumed to induce breaches of the peace, but that plaintiffs had no vested right to have such a rule of law continue in that state; that under paragraph 1464 picketing was no longer conclusively presumed to be unlawful; that the paragraph simply dealt with a rule of evidence requiring the courts to substitute evidence of the nature of the act for the presumption otherwise arising; that the plaintiffs' property rights were not invaded by picketing, unless the picketing interfered with the free conduct of the business; that plaintiffs did not claim that defendants had by violent means invaded their rights; and that, if that kind of picketing were charged and established by proof, plaintiffs would be entitled to relief to the extent of prohibiting violence in any form.

The effect of this ruling is that, under the statute,

nial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class.

Mr. Justice Matthews, in Yick Wo v. Hopkins, 118 U. S. 356, speaking for the court of both the due process and equality clause of the Fourteenth Amendment said:

"These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

The accuracy and comprehensive felicity of this description of the effect of the equality clause are shown by the frequency with which it has been quoted in the decisions of this court. It emphasizes the additional guaranty of a right which the clause has conferred beyond the requirement of due process.

With these views of the meaning of the equality clause, it does not seem possible to escape the conclusion that by the clauses of paragraph 1464 of the Revised Statutes of Arizona (Civ. Code) here relied on by the defendants, as construed by its Supreme Court, the plaintiffs have been deprived of the equal protection of the law." * * *

"It is urged that, in holding paragraph 1464 invalid, we are in effect holding invalid section 20 of the Clayton Act (Comp. St. 1243d). Of course, we are not doing so. In the first place, the equality clause of

the Fourteenth Amendment does not apply to congressional, but only to state, action. In the second place, section 20 of the Clayton Act never has been construed or applied as the Supreme Court of Arizona has construed and applied paragraph 1464 in this case."

Yick Wo v. Hopkins, 118 U. S. 356, 369. 6 Sup. Ct. Rep. 1064, 1071.

"No duty rests more imperatively upon the courts than the enforcement of these constitutional provisions intended to secure that equality of rights which is the foundation of free government."

Cooley's Constitutional Limitations, 5th ed. 484, 486.

"Everyone has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments. Those who make the laws are to govern by promulgated, established laws not to be varied in particular cases, but to have one rule for rich and poor, for favorite at court and the countryman at plow'. This is a maxim in constitutional law, and by it we may test the authority and binding force of legislative enactments."

IV

Defendant in error in its brief seems to lay great

stress on the holding of the Kentucky Court of Appeals in Owen County Burley Tobacco Association v. Brumback, 128 Ky. 137, and Com. v. Hodges, 137 Ky. 233, which cases seem to have been cited with approval in many of the decisions from the supreme courts of the various states which are set out in defendant in error's brief, many of which seem to be based upon the arguments of the Kentucky cases. The holdings of the Kentucky Court of Appeals in the Owens County and in the Hodges cases, supra, were completely over-ruled by this court in the case of Collins v. Com. of Ky., 234 U. S. 634, 34 S. Ct. 924, and International Harvester Company v. Com. of Ky., 234 U. S. 589, 34 S. Ct. 947, which seems to have wholly escaped the exhaustive research of the defendant in error.

The standard co-operative marketing acts have bantered about the words "grade," "process," "stabilize," etc., to such an extent as to create a grave misconception of the meaning of these words and facts in connection with them Take for instance the mis-construction of facts from the Supreme Court of Ohio, an unusually staid and well informed court, in the List case pages 31 and 32 of brief of defendant in error) :—

"In fact, there would seem to be a greater variation in the quality of this product than of any other known to us. A producer of a modest crop may find that his crop consists of literally dozens of grades. It requires expert knowledge to so sort a crop getting like qualities separated from tobacco of dissimilar qualities. The grower not only lacks the knowledge necessary to properly sort and grade his own product but if he could

do so, he would have so many different grades in a modest crop that he could only advantageously dispose of his crop by securing such different purchasers for the different grades as should happen to be interested in the particular grade."

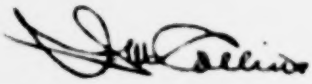
Hardly anything could be further from the fact than that the grower lacks knowledge necessary to properly sort and grade his own product, or that if he could do so, he would have so many differeent grades in a modest crop that he could not advantageously dispos-of it. As a matter of fact, fifteen to twenty leaves grow on a tobacco stalk and these leaves vary greatly in texture, but the man who produces the tobacco is the one, and the only one, that properly separates these leaves and ties them into hands of different grades. The grading is already done by the producer before the tobacco is delivered at a sales house,and what the defendant in error terms "grading" means simply to assign the different grades which the producer brings to the warehouse to various like grades which is then "typed" by placing a colored card on it with a letter of the alphabet indicating the particular type. The placing of this card on the tobacco is practically all that the marketing association does in the way of grading. Just what the marketing act means to cover by the word "processing" is not clear, but presumably it means storing the tobacco until there was sufficient of it taken off the market to enhance the price.

One who is reasonably familiar with the handling of tobacco cannot help but be amazed at the frequent repetition and great enlargement given to these words

in the brief of defendant in error. What the marketing association has done in the way of the handling of tobacco simply consists of typing it, sometimes re-drying it, storing it and fixing the price.

It is respectfully submitted that defendant in error's demurrer to the plaintiff in error's Answer in the Mason Circuit Court should be over-ruled and this case reversed.

All of which is respectfully submitted.



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McKay v. Dillon 4 How. 431

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Yick Wo v. Hopkins 118 U. S. 356 6 S. Ct. 1065.

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Collins v. Commonwealth of Kentucky 234 U. S. 634 34 S. Ct. 924

Int. Harvester Co. v. Commonwealth of Ky. 234 U. S. 589 34 S. Ct. 947.

FEB 3 1927
WM. R. STANSBURY
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1926.

No. ~~159~~ 18

THE LIBERTY WAREHOUSE COMPANY,
Plaintiff in Error,

vs.

BURLEY TOBACCO GROWERS' CO-OPERATIVE MARKETING ASSOCIATION,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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33

INDEX.

PAGE

History of the case 1

Statement of facts 3

A. Outline of case at bar 4

B. Facts in connection with co-operative marketing of tobacco 11

C. Outline of Standard Co-operative Marketing Law 35

D. Outline of Standard Co-operative Marketing Contract 48

E. Citation of cases by states sustaining Co-operative Marketing Law and Contract 51

Question presented 55

Summary of argument ..... (57-58) I, II, III

Argument 58

I. The Co-operative Marketing Act of Kentucky does not violate the Fourteenth Amendment to the Constitution of the United States 58

A. The Co-operative Marketing Act provides for a new type of corporation to enable farmers to market their products co-operatively 59

B. The classification contained in the Act is reasonable 61

C. The provision that co-operative associations organized in accordance with law shall not be considered in restraint of trade is a proper declaration of public policy 73

D. Connolly v. Union Sewer Pipe Co. (1902) 184 U. S. 540, considered and distinguished 88

E. Connolly case, *supra*, uniformly held not applicable in Co-operative Marketing cases 99

II. SECTIONS 26 AND 27 ARE REASONABLE AND NECESSARY PROVISIONS TO MAKE THE CO-OPERATIVE SYSTEM PRACTICAL AND EFFECTIVE AND TO SAFEGUARD THE MARKETING CONTRACT BETWEEN THE ASSOCIATION AND ITS MEMBERS FROM BREACH DELIBERATELY INDUCED BY THIRD PERSONS OUTSIDE THE ASSOCIATION 105

A. The marketing contract is the cornerstone of the Co-operative Marketing structure 107

B. The Legislature has a right to protect such contract against breach which threatens the marketing system 108

C. Public policy to uphold marketing contract 115

D. Penal provision necessary to protect co-operative system 118

E. Section 27 intended to stop deliberate and malicious interference with contract relations 124

F. Section 27 is a reasonable regulation of a business and an activity impressed

with a public interest, to wit: (1) the warehouse business; and (2) public auctions 133

1. Leaf tobacco warehouses are subject to regulation 134

2. Public auctions are subject to public regulation 145

G. Sections 26 and 27 are a proper exercise of Police Power to prevent fraudulent and unlawful evasion or breach of contract 149

H. The penalties provided in Section 27 do not deny due process of law or the equal protection of the laws to warehousemen or auctioneers 159

I. Minnesota Wheat Growers Co-operative Association v. Radke (1925), 204 N. W. 314, considered 170

III. THE BURLEY TOBACCO GROWERS CO-OPERATIVE ASSOCIATION IS ORGANIZED IN ACCORDANCE WITH THE LAWS OF KENTUCKY AND OF THE UNITED STATES AND IS NOT ORGANIZED OR DOING BUSINESS IN VIOLATION OF STATE OR FEDERAL ANTI-TRUST LAWS 179

A. The Burley Tobacco Growers Co-operative Association is not organized or doing business in violation of the Sherman Anti-Trust Law 182

1. The Co-operative Marketing Act does not authorize evils condemned by the Sherman Anti-Trust Law 184

2. The Co-operative Marketing Act excludes associations organized thereunder from condemnation as illegal trusts or monopolies.. 199

3. The laws of the United States specifically authorize co-operative associations of the character of defendant in error..... 201

4. The appellate courts of the four states where the Burley Association is principally engaged in business (Kentucky, Ohio, Tennessee and Indiana) have spespecifically found that it is not organized or operating in violation of either Federal or State Anti-Trust Laws 208

5. All courts uniformly hold that Co-operative Marketing Acts and associations organized thereunder do not violate the Anti-Trust Laws 225

Alabama 226
California 227
Colorado 229
Georgia 230
Illinois 233
Indiana 234
Iowa 236
Kansas 237
Kentucky 238
Louisiana 239
Minnesota 240
Mississippi 243

Nebraska 245
New Hampshire 246
New York 246
North Carolina 247
Ohio 250
Oregon 251
South Carolina 251
Tennessee 252
Texas 255
Virginia 256
Washington 257
Wisconsin 259
Canada 261

B. The counterclaim for a declaration of rights as to the Anti-Trust Law is improper pleading 268

C. The state courts have no jurisdiction of an action for treble damages under the Sherman Anti-Trust Law 273

D. A tortious intermeddler with the contracts between defendant in error and its members can not raise the question of their illegality 279

IV. Section 27 of the Co-operative Marketing Act of Kentucky is not an unlawful regulation of interstate commerce 281

A. Interstate commerce not involved 281

B. Interstate activities of co-operative associations sanctioned by Federal law 286

V. Brief of plaintiff in error considered 288

Conclusion 293

APPENDIX A—Report of the Secretary of Agriculture of the United States for the year 1926 pertaining to Co-operative Marketing 297

APPENDIX B—Opinion of Court of Appeals in case at bar 312

APPENDIX C—Standard Co-operative Marketing Contract of the Burley Tobacco Growers Co-operative Association 321

APPENDIX D—Articles of Incorporation of the Burley Tobacco Growers Co-operative Association 329

APPENDIX E—Bingham Co-operative Marketing Act 335

APPENDIX F—Chart of the Bingham Co-operative Marketing Act of Kentucky and of similar laws in other states 353

TABLE OF CASES.

PAGE

A.

Abernathy v. Meyer, 99 S. W. 942 272
Alexander v. Enright (1924), 211 App. Div. 146; 206 N. Y. Supp. 785 148
American Law Reports Annotated, 15 A. L. R. 262; 24 A. L. R. 523; 30 A. L. R. 1331; 40 A. L. R. 1014 .. 158
American Law Reports Annotated, 11 A. L. R. 884 .. 169
American Steel, etc. Co. v. Speed (1904), 192 U. S. 500; 48 L. ed. 538 284
American Sugar Refining Co. v. Louisiana, 179 U. S. 89; 45 L. ed. 142 ..... 66, 96
Anaheim Citrus Fruit Ass'n v. Yeoman (1921), 51 Cal. App. 759; 197 Pac. 959 228
Angle v. Chicago, St. P. & Mpls. & Omaha Ry. Co. (1893), 151 U. S. 1; 38 L. ed. 55 126
Annual Message, President of U. S. 1926 ..... 3, 294
Arkansas Cotton Growers Co-op. Ass'n v. Brown (1925), Ark. 270 S. W. 946 ..... 117, 119
Armour v. Va. (1918), 246 U. S. 1; 62 L. ed. 547 64
Armour & Co. v. North Dakota (1916), 240 U. S. 510; 60 L. ed. 771 64
Atchison, T. & S. F. R. Co. v. Matthews ( ), 174 U. S. 96; 43 L. ed. 909 162
Atchison, T. & S. F. Ry. Co. v. Vosburg, 238 U. S. 56; 59 L. ed. 1199 165
Auctions and Auctioneers 6 Corp. Juris. 20 145

Austin v. Tennessee (1900), 179 U. S. 343; 45 L. ed. 224 ..... 284, 29

Axton v. Goodman (1924), 205 Ky. 382; 265 S. W. 806 ..... 272, 27

B.

Bacon v. Illinois (1913), 227 U. S. 504; 57 L. ed. 619 28

Bacon v. Walker (1907), 204 U. S. 311, 51 L. ed. 499 14

Baldwin County Producers v. Frishkorn, 17 Ala. App. 84; 81 So. 862 21

Beekman v. Marsters (1907), Mass. 80 N. E. 817 13

Bertig Bros. v. Independent Gin Co. (1920), 143 Ark. 347; 220 S. W. 669 14

Biddles v. Enright (1925), 239 N. Y. 354; 146 N. E. 625 ..... 146, 15

Billings v. Illinois (1903), 188 U. S. 97; 47 L. ed. 400 9

Bitterman v. Louisville & Nashville Ry. Co. (1907), 207 U. S. 205; 52 L. ed. 171 12

Blumenstock Bros. Advertising Agency v. Curtis Publishing Co. (1920), 252 U. S. 436; 64 L. ed. 649 ..... 275, 28

Board of Trade of Chicago v. Olsen (1923), 262 U. S. 1; 67 L. ed. 839 14

Booth v. Illinois, 184 U. S. 425 28

Bowen v. Hall (1881), 6 Q. B. D. 333 12

Brass v. North Dakota (1894), 153 U. S. 391; 38 L. ed. 757 13

Brazee v. Michigan (1916), 241 U. S. 340; 60 L. ed. 1034 15

Bristow First Nat'l Bank v. Rogers (1909), 24 Ok. 357; 103 Pac. 582 28

Brown v. Houston (1885), 114 U. S. 628; 29 L. ed. 259 284
Brown v. Staple Cotton Co-op. Ass'n (1923), 132 Miss. 859; 96 So. 849 243
Brown-Foreman Co. v. Commonwealth, 125 Ky. 402; 101 S. W. 321; 30 Ky. L. R. 793 65
Brown-Foreman Co. v. Kentucky (1910), 217 U. S. 563; 54 L. ed. 883 284
Budd v. New York (1892), 143 U. S. 517; 36 L. ed. 247 138-9
Buffalo v. Marion (1895), 13 Misc. 639; 34 N. Y. Supp. 945 148
Bullville Milk Producers Ass'n v. Anderson (1919), 108 Misc. Rep. 582; 178 N. Y. S. 612 246
Burley Tobacco Growers Co-operative Association v. Gardner, 25 Ohio N. P. N. S. 1 19
Burley Tobacco Growers Co-operative Association v. Rogers (1926), Ind. App. 150 N. E. 384 ..... 20, 116, 219, 234
Burley Tobacco Society v. Gillaspy (1912), 51 Ind. App. 583; 100 N. E. 89 ..... 86, 119, 234, 291
Burlington v. Beasley (1877), 94 U. S. 310; 24 L. ed. 164 142

C.

Cadwell v. Lincoln (1886), 19 Neb. 569; 27 N. W. 647 148
Caldwell v. Sioux Falls Stockyards Co. (1917), 242 U. S. 559 158
Cal. Bean Growers Ass'n v. Rindge Land & Navigation Co. (1926), Cal. 248 Pac. R. 658 227
Cargill Co. v. Minnesota ex rel. Railroad and Warehouse Commission (1901), 180 U. S. 452; 45 L. ed. 619 ..... 63, 139

Carlisle v. Heckinger, 103 Ky. 381; 45 S. W. 358; 20 Ky. La. Rep. 74 .....

Carlton v. Watertown (1924), 124 Misc. 244; 207 N. Y. Supp. 339 .....

Castorland Milk & Cheese Co. v. Schantz (1919), 179 N. Y. S. 131 .....

Cement Mfrs. Protective Ass'n v. U. S. (1925), 206 U. S. 588; 69 L. ed. 1104 .....

Charity Hospital v. Richhart (1916), 139 La. 446; 71 So. 735 .....

Chicago, B. & Q. R. Co. v. Feintuch (1911), 191 Fed. Rep. 482 (C. C. A. 9) .....

Chicago Dock Co. v. Garrity (1885), 115 Ill. 155; 3 N. E. 448 .....

Chicago N. W. Ry. Co. v. Nye, Schneider, Fowler Co. (1922), 260 U. S. 35; 67 L. ed. 115 .....162, 164,

Citation of Co-operative Marketing Cases by States 51, 52, 53,

Clark v. Kansas City (1900), 176 U. S. 114; 44 L. ed. 392 .....

Clein v. Atlanta (1924), 159 Ga. 121; 124 S. E. 882 .....

Clear Lake Co-op. Live Stock Shippers Ass'n v. Weir (1925), Ia. 206 N. W. 297 .....70, 85, 219,

Columbia Law Review, Vol. 17, p. 113 .....

Commonwealth v. Hodges (1910), 137 Ky. 233; 125 S. W. 689 .....16, 17, 106, 108, 110, 111, 235,

Connolly v. Union Sewer Pipe Co. (1902), 184 U. S. 540; 46 L. ed. 679 88,

Continental Wall Paper Co. v. Voight, 212 U. S. 227; 53 L. ed. 486 .....

Co-operative Marketing by Steen .....

Corpus Juris, 41 C. J. 76 200,

Corpus Juris, 6 C. J. 20 145
Cox v. Texas, 202 U. S. 446; 50 L. ed. 1099 98
Coyle v. Dark Tobacco Growers Co-op. Ass'n (1925), Ky. 277 S. E. 318 177
Crescent Cotton Oil Co. v. Miss. (1921), 257 U. S. 129; 66 L. ed. 166 ..... 64, 286
Cutsinger v. City of Atlanta (1914), 142 Georgia 555 141
38 Cyc. 508 219

D.

Danville Warehouse Co. v. Tobacco Growers Co-op. Ass'n, 129 S. E. 739 256
Dark Tobacco Growers Co-op. Ass'n v. Daniels (1926), Ky. 284 S. W. 399 178
Dark Tobacco Growers Co-op. Ass'n v. Dunn (1924), 150 Tenn. 612; 266 S. W. 308 ..... 21, 99, 123, 254
Dark Tobacco Growers Co-op. Ass'n v. Mason (1924), 150 Tenn. 228; 263 S. W. 60 ..... 20, 123, 252
Davis v. State (1880), 68 Ala. 58 144
Dillingham v. McLaughlin (1924), 264 U. S. 370; 68 L. ed. 742 65
Dorchy v. Kansas (1926), 71 L. ed. ..... U. S. Sup. Ct. Adv. Opinions, Nov. 1, 1926 174
Duplex Printing Press Co. v. Deering (1921), 254 U. S. 443; 65 L. ed. 349 98

E.

Earley v. Co-operative Pure Milk Ass'n, 115 O. S. 52; dec. June 8, 1926 250
Elmore v. Maryland & Va. Milk Producers Ass'n, Va. 132 S. E. 521 (decided March 18, 1926) 256

I.

Inducing Breach of Contract 36 Harvard Law Review 663 .....

International Harvester Co. v. Missouri, 234 U. S. 199; 34 S. Ct. 859; 58 L. ed. 1276; 52 L. R. A. (N. S.) 525 65,

J.

Jacobson v. Mass. (1905), 197 U. S. 11; 49 L. ed. 643 .....

Jenkins v. State (1904), 119 Ga. 430; 46 S. E. 629 ...

Jewell Tobacco Warehouse Co. et al. v. Kemper (1925), 206 Ky. 667; 208 S. W. 324 ... 65, 153, 154,

K.

Kansas City So. R. Co. v. Anderson, 233 U. S. 325; 58 L. ed. 983 .....

Kansas Wheat Growers Association v. Charlet (1925), 118 Kan. 965; 236 P. 657 101,

Kansas Wheat Growers Ass'n v. Floyd (1924) ....

Kansas Wheat Growers Ass'n v. Robbin, 227 Pac. 336 .....

Kansas Wheat Growers Ass'n v. Schulte (1923), 113 Kan. 672; 216 P. 311 120,

Kelly v. Jackson (1925), 206 Ky. 815; 268 S. W. 539

Kenton Loose-Leaf Warehouse Co. v. Orie S. Ware, No. 25591, Kenton Circuit Court, Kentucky .....

Kidd, Dater & Price Co. v. Musselman Grocery Co. (1910), 217 U. S. 461; 30 S. Ct. 606; 54 L. ed. 839

Kinner v. Lake Shore & M. S. R. Co. 69 Ohio St. 339; 69 N. E. 614 .....

L.

Lemieux v. Young (1908), 211 U. S. 489; 29 S. Ct. 174; 53 L. ed. 295 156
Leovey v. U. S. 177 U. S. 621; 44 L. ed. 914 292
Levi v. Annison (1908), 155 Ala. 149 156
Liberty Warehouse Co. v. Burley Tobacco Growers Co-operative Association (1925), 208 Ky. 643; 271 S. W. 695 ..... 2, 19, 107, 123, 239
Liberty Warehouse et al. Plaintiff in Error v. B. S. Grannis, Defendant in Error, No. 60, Oct. Term, 1926, decided Jan. 3, 1927 270
Lindsley v. Natural Carbonic Gas Co. (1911), 220 U. S. 61; 55 L. ed. 369 62
List v. Burley Tobacco Growers Co-operative Association (1926), 114 O. S. 361; 151 N. E. 471 ..... 19, 24, 30, 83, 101, 117, 193, 209, 250
Little v. Williams (1913), 231 U. S. 335; 58 L. ed. 256 292
Loewe & Co. v. Lawlor (1904), 130 Fed. Rep. 633 (affirmed 209 Fed. Rep. 721; 208 U. S. 274; 235 U. S. 522) 275
Louisiana v. Weinstein (1917), 181 La. 1086; 76 So. 208 156
Louisiana Farm Bureau Cotton Growers Co-op. Ass'n v. Clark, 160 La. ; 107 So. 115; Dec. Jan. 4, 1926 239
Louisville and Nashville R. R. Co. v. Burley Tobacco Society et al. (1912), 147 Ky. 22; 143 S. W. 1040. 16, 238
City of Louisville v. Sagalowski & Son, 136 Ky. 324; 124 S. W. 339; 136 Am. St. Rep. 258 66

Louisville v. Schnell, 131 Ky. 104; 114 S. W. 742; 40 L. R. A. (N. S.) 637 6
Lumley v. Gye (1853), 2 El. & Bl. 216 12
Ludowese v. Farmers Co-op. Co. 164 Ia. 197; 145 N. W. 475 23

M.

Manchester Dairy System, Inc. v. Hayward, decided Jan. 5, 1926, N. H. 132 Atl. 12 ..... 115, 120, 24
Maple Flooring Mfgrs. Ass'n v. U. S. (1925), 268 U. S. 563; 69 L. ed. 1093 19
Margolies v. Atlantic City (1901), 67 N. J. L. 82; 50 Atl. 367 14
Matter of Application of Jacobs (1885), 98 N. Y. 98 29
McArdle v. Ind. Water Co. U. S. 71 L. ed. 154 (decided Nov. 22, 1926) 29
Merchants Exchange v. Knott (1908), 212 Mo. 616; 111 S. W. 565 14
Merchants Exchange of St. Louis v. Missouri ex rel. Barker (1919), 248 U. S. 365; 63 L. ed. 300 ..... 64, 28
Merrick v. N. W. Halsey Co. (1917), 242 U. S. 568; 61 L. ed. 498 15
Metropolitan Life Insurance Co. v. City of Paris, 138 Ky. 801; 129 S. W. 112 6
Miller v. Wilson (1915), 236 U. S. 373; 59 L. ed. 628 ..... 67, 97, 10
Millikeh-Thompson Co. v. American Sugar Refining Co. 9 F. (2d) 809 27
Milk Producers Marketing Co. v. Bell (1924), 234 Ill. App. 222 23

Minnesota ex rel. Beek v. Wagener (1899), 77 Minn. 483; 80 N. W. 633 157

Minnesota Wheat Growers Co-operative Marketing Association v. Huggins (1925), 162 Minn. 471; 203 N. W. 420 ..... 20, 25, 47, 103, 122, 290, 240

Minnesota Wheat Growers Co-op. Ass'n v. Radke (1925), Minn. 204 N. W. 314 ..... 107, 170

M. K. & Texas Railway Co. of Texas v. Cade (1914), 233 U. S. 642; 58 L. Ed. 1135 ..... 163, 169

Missouri, Kansas & Texas Ry. Co. v. Haber (1898), 169 U. S. 613; 42 L. ed. 878 288

Missouri, Kansas & Texas Railway Co. of Texas v. May (1904), 194 U. S. 267; 48 L. ed. 971 65

Mogul v. Gaither (1923), 142 Md. 380; 121 Atl. 32 147

Monopolies, 41 Corp. Juris 76 ..... 200, 224

Municipality of Ponce v. Roman Catholic Apostolic Church (1908), 210 U. S. 296 292

Munn v. People of Ill. (1877), 94 U. S. 113; 24 L. ed. 77 138

Mutual Loan Co. v. Martell (1911), 222 U. S. 225; 56 L. ed. 175 63

N.

Nat'l Union Fire Ins. Co. v. Wanberg (1922), 260 U. S. 71; 67 L. ed. 136 68

Nebraska Wheat Growers' Ass'n v. Norquest, 204 N. W. 798; decided July 1, 1925 ..... 245, 287

New York etc. Stock Exchange v. Board of Trade (1889), 127 Ill. 153; 19 N. E. 855 142

New York Central Railroad Co. v. White (1917), 243 U. S. 188; 61 L. ed. 187 ..... 66, 97, 102

"Night Riding to Co-operation," by Steen 149
Northern Wisconsin Co-operative Tobacco Pool v. Bekkedal et al. (1923), 182 Wis. 571; 197 N. W. 936 .....20, 28, 46, 85, 103, 107, 122, 131, 259, 280

O.

Oklahoma Gin Co. v. State (1916), 63 Okla. 10; P. U. R. 1916, c. 22, 158 Pac. 629 144
Omechevarria v. Idaho (1918), 246 U. S. 343; 62 L. ed. 763 64
Oregon Growers Co-op. Ass'n v. Lentz (1923), 107 Ore. 561; 212 Pac. 811 .....121, 251
Oregon Growers Co-op. Ass'n v. Riddle, Ore. 241 Pac. 1011 251
Otis & Gassman v. Parker (1903), 187 U. S. 606; 47 L. ed. 323 293
Owen County Burley Society v. Brumback, 128 Ky. 137; 107 S. W. 710; 32 Ky. L. Rep. 916 ....16, 72, 123, 235, 238

P.

Packard v. Banton (1924), 264 U. S. 140; 68 L. ed. 596 64
Park v. Laurens Cotton Mills (1907), 75 S. C. 560; 56 S. E. 234 .....144, 157
Parnell v. Louisville Tobacco Warehouse Co. (1902), 113 Ky. 630, 632; 23 Ky. L. Rep. 2423 134
Payne v. State of Kansas (1918), 248 U. S. 112; 63 L. ed. 153 64
People v. Beakes Dairy Co. (1918), 222 N. Y. 416; 119 N. E. 150 157

People v. Gibbs (1915), 186 Mich. 127; 152 N. W. 1053, Ann. Cas. 1917B, 830 147

People ex rel. Schwab v. Grant (1891), 126 N. Y. 473; 27 N. E. 964 148

People v. Steele (1907), 231 Ill. 340 142

Pierce County Dairymen's Ass'n v. Templin (1923), 124 Wash. 557; 315 Pac. 352 258

Pittsburgh, etc. Coal Co. v. Louisiana (1895), 158 U. S. 600; 39 L. ed. 544 284

Pomeroy's Code Remedies, 4th Ed. 927 272

Potter v. Dark Tobacco Growers Co-op. Ass'n, 201 Ky. 447; 257 S. W. 336 .....19, 24, 72, 79, 82, 221, 239

Poultry Producers of Southern Cal. v. Barlow (1922), 189 Cal. 278; 208 Pac. 93 228

Proctor et al. v. Avondale Heights Co. (1923), 200 Ky. 447 273

R.

R and W Hat Shop v. Scully (1922), 98 Conn. 1; 118 Atl. 55; 29 A. L. R. 551 132

Read v. Colo. (1902), 187 U. S. 137; 47 L. ed. 108 287

Reaves Warehouse Corp. v. Commonwealth of Virginia (1925), ____ Va. ____; 126 S. E. 87 ....135, 145, 151, 256

Reeves v. Decorah Farmers Co-op. Society, 160 Ia. 190; 140 N. W. 844 .....219, 236

Rennenbaum v. Atkinson, 45 S. W. 874 272

Richard M. Jones v. Union Guano Co. (1924), 264 U. S. 171 64

Rifle Potato Growers v. Smith (1925), Col. 240 Pac. 937 .....71, 82, 229, 230

Rights of Cestui que Trust, 17 Col. Law Review 113 132
Roanoke v. Fisher (1923), 137 Va. 75; 119 S. E. 259 148
Robertson v. Dark Tobacco Growers Co-operative Association (1926), Ind. App. 150 N. E. 106....19, 234
Robinson v. Wood (1922), 119 Misc. 299; 196 N. Y. Supp. 209 148
Rochester v. Close (1885), 35 Hun 208..... 148
16 Rose's Notes 727; 3 Supp. 128..... 287
9 Rose's Notes 510, 519.....139, 140
Rosenthal v. New York (1912), 226 U. S. 260; 57 L. ed. 213 155
15 Ruling Case Law 41..... 129
15 Ruling Case Law 60..... 130
19 Ruling Case Law 57..... 276

S.

Samuelson v. State, 116 Tenn. 470..... 127
Saskatchewan Co-op. Wheat Producers, Ltd. v. Zurowski (1926), 3 D. L. R. 810 (Weekly Advance Reports of September 23, 1926).....261, 263
S. C. Cotton Growers Co-op. Ass'n v. English, decided May 31, 1926; S. C. 133; S. E. 542..... 251
Schubach v. McDonald, 179 Mo. 163; 65 L. R. A. 136 127
Seaboard Airline Railroad Co. v. Seegars (1907), 207 U. S. 73; 52 L. ed. 108.....162, 168
Shearer & Ramsey v. Becker et al. (1925), 207 Ky. 455 273
Shurman v. Atlanta (1819), 148 Ga. 1; 95 S. E. 698.. 156
Sims v. State (1921), 80 Okla. 254; 196 Pac. 132..... 144

Singer Sewing Machine Co. v. Brickell (1914), 233 U. S. 304; 58 L. ed. 974 286
Sligh v. Kirkwood (1913), 237 U. S. 52; 59 L. ed. 835 292
Smith v. Kansas City Trust Co. (1921), 255 U. S. 180; 65 L. ed. 577 67
St. John v. N. Y. (1906), 201 U. S. 633; 50 L. ed. 696. 63
St. Louis J. M. & S. R. Co. v. Wynne ( ), 224 U. S. 354; 56 L. ed. 799 163
St. Louis, I. M. & So. Rlwy. Co. v. Dicksey Williams (1919), 251 U. S. 63; 64 L. ed. 139 161
State ex rel. Cook v. Bates (1907), 101 Minn. 301; 112 N. W. 67 148
State v. Edwards (1893), 86 Maine 102; 29 Atl. 947.. 142
State v. Howat, 112 Kans. 235; 210 Pac. 352 175
State v. Moore (1889), 104 N. C. 714; 10 S. E. 143.. ..... 144, 157
State v. Mullins (1911), 87 S. C. 510; 70 S. E. 9.... 144
State, Public, etc. Comm. v. Monarch Refrigerating Co. (1915), 267 Ill. 528; 108 N. E. 716 141
State v. Razook (1920), 179 N. C. 708; 103 S. E. 67.. 148
State ex rel. Lion v. State Warehouse Commission (1912), 92 S. C. 81; 75 S. E. 392 144
Steele, etc. Co. v. Miller (1915), 92 O. S. 115; 110 N. E. 648; Ann. Cas. (1917) C. 926 157
Susquehanna Coal Co. v. Amboy (1913), 228 U. S. 665; L. ed. 1015 286
Swain v. Johnson, 151 N. C. 93 132

T.

Tallahassee Oil Fertilizer Co. v. Holloway (1917), 220 Ala. 492 144

Temperton v. Russell (1893), 1 Q. B. 719 126

Tennessee ex rel. Thompson, Attorney General, v. Burley Tobacco Growers' Co-operative Association, decided by the Court of Appeals of Tennessee, July 24, 1926; not yet officially reported 20, 194, 213, 252

Tennessee Cotton Growers Co-op. Ass'n v. Hanson (decided April, 1926, not yet officially reported) .. 54

Territory of New Mexico v. Denver & G. R. R. Co. 203 U. S. 38; 51 L. ed. 78 292

Texas Co. v. Brown (1922), 258 U. S. 466; 66 L. ed. 721 284

Texas Farm Bureau Cotton Ass'n v. Kyle (1926), 281 S. W. 629 256

Texas Farm Bureau Cotton Ass'n v. Stoval (1923), 113 Tex. 273; 253 S. W. 1101 ..... 107, 122, 256

Thacker Coal Co. v. Burke, 59 W. Va. 353 132

Tobacco Growers Co-operative Association et al. v. Dunn (1924), 150 Tenn. 612; 267 S. W. 308 20

Tobacco Growers Co-op. Ass'n v. Jones (1923), 185 N. C. 265; 117 S. E. 174 ..... 20, 25, 46, 122, 247, 291

Tobacco Growers Warehouse Ass'n v. Danville Warehouse Co. Inc. (1926), ____ Va. ____; 132 S. E. 482 ..... 107, 114, 122, 256

U.

United States v. The American Tobacco Co. (1910) 210, 106; 55 L. ed. 663 184
U. S. v. Freight Association, 166 U. S. 290; 17 Sup. Ct. 540; 41 L. ed. 1007 87
U. S. v. General Electric Co. U. S. Sup. Ct. advance opinions Dec. 15, 1926; 71 L. ed. 216 196
U. S. v. Hamburg, etc. 239 U. S. 466; 60 L. Ed. 387 292
U. S. v. Standard Oil Co. (1910), 221 U. S. 1 184
U. S. v. U. S. Steel Corp. (1920), 251 U. S. 417; 64 L. ed. 343 195

V.

Village of Euclid v. Ambler Realty Co. No. 31, Oct. Term 1926, decided Nov. 22, 1926 87
Village of Minnecota v. Martin (1914), 124 Minn. 498; 51 L. R. A. (N. S.) 40; 145 N. W. 383; Ann. Cas. 1915B, 812 148

W.

Wagner v. Covington (1919), 251 U. S. 95 284
Walters-Pierce Oil Co. v. Deselms Co. (1909), 212 U. S. 159; 53 L. ed. 453 292
Ward v. Krinsky (1922), 259 U. S. 503; 66 L. ed. 1033 66
Warren v. Alabama Farm Bureau Cotton Ass'n (1925), Ala. 104 So. 264 ..... 116, 219, 226
Washington Cranberry Growers Ass'n v. Moore (1921), 117 Wash. 431; 201 Pac. 773 257
Watson v. Md. (1910), 218 U. S. 173; 34 L. ed. 987 .. 63

182; §3115-4/5k (4) U. S. Comp. Stat. 1925 Supp.) 78, 207

Act exempting co-operative associations from income tax (11 c. 234 § 231, 43 Stat. 282, June 2, 1924; U. S. Comp. Stat. 1925 6336-1/6nn) 78, 207

Grain Futures Act granting co-operative associations membership privilege in grain exchanges (par e, c. 369, §5, 42 Stat. 1000, Sept. 1, 1922, U. S. Comp. Stat. 1925 § 8747-4/5d) 78, 142, 207

Illinois Anti-Trust Act, Sec. 9 ..... 89, 90

Sections 25a-b Amendment to Virginia Co-operative Marketing Act, Acts of Extra Session 1923, page 131, c, 110 ..... 107, 114

Virginia Act to require leaf tobacco to be sold in name of true owner, enacted Extra Session 1923, page 129 114

Ordinance of Laborers [1349] 23 Edw. III 126

Leigh's Revised Code of 1819, Vol. 2 137

Statutes of Virginia 1919 §§ 1358, 1393 to 1394; and 1348 to 1399 137

Henning's Virginia Statutes at Large [1619] Vol. 1. 137

Acts of Congress re Tobacco and Snuff, U. S. Comp. Stat. 1918, Sec. 6192-6196, Supp. 1925, Sec. 6168-6204d, and 4 Fed. Stat. Ann. 2nd ed. 136 138

Kentucky Act Regulating Sale of Leaf Tobacco at Public Auction, Chap. 10, Laws of 1924 153

Kentucky Code re Counterclaim, Carroll's Kentucky Code, Sec. 96 271

Kentucky Declaratory Judgment Law, Acts of 1922, Chapter 83 ..... 269, 272

Sherman Anti-Trust Act of July 2, 1890, c. 647, 26 Stat. 209 (Sec. 8820-21, 22, 23, 24, 27, 28, 29, 30, U. S. Comp. Stat. 1918) 274

Judicial Code §24, paragraph 23 274

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1926.

No. 159

THE LIBERTY WAREHOUSE COMPANY,
Plaintiff in Error,

vs.

BURLEY TOBACCO GROWERS' CO-OPERATIVE MARKETING ASSOCIATION,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

HISTORY OF THE CASE.

This action was commenced by the Burley Tobacco Growers' Co-operative Association, defendant in error, in the Circuit Court of Mason County, Kentucky. (R. 1.)

The action was brought against the Liberty Warehouse Co., plaintiff in error, to recover the penalty provided in Section Twenty-Seven of the Bingham Co-operative Marketing Act for a violation of said Act.

The Warehouse Company filed a demurrer, an answer, and a counterclaim to the petition. (R. 11, 18-24.)

The Circuit Court overruled the demurrer of the Warehouse Company to the petition and sustained the demurrer of the Burley Tobacco Growers Association to the answer and sustained its motion to strike the counterclaim. (R. 24-25.)

The Warehouse Company, plaintiff in error declined to plead further. A trial by jury was waived by the parties. The court heard the petition upon the law and the facts, and awarded a judgment in favor of the Burley Tobacco Growers Co-operative Association, defendant in error, for a penalty of Five Hundred Dollars ($500.00), and for an attorney fee of One Hundred Dollars ($100.00), in accordance with the statute. (R. 25.)

The judgment of the Circuit Court of Mason County, was affirmed by the Court of Appeals of Kentucky. (R. 31.)

The opinion of the Court of Appeals appears in the record (R. 31-37), and is reported as:—*The Liberty Warehouse Company* v. *Burley Tobacco Growers Co-operative Association* (1925) 208 Ky. 643, 271 S. W. 695.

The Liberty Warehouse Company seeks to reverse the judgment of the Court of Appeals of Kentucky affirming the judgment in favor of the Burley Association, rendered by the Circuit Court of Mason County.

Broadly stated, the question presented in this case is whether the co-operative marketing of agricultural products, as authorized by the existing laws of the United States and by the statutes of three-fourths of the states, is constitutional, and whether the state has power to safeguard co-operative contracts so as to make the system practical and effective.

STATEMENT OF FACTS.

There are Ten Thousand, Eight Hundred (10,800) co-operative marketing associations registered with the United States Department of Agriculture (Division of Co-operative Marketing, Bureau of Agricultural Economics, United States Department of Agriculture, Volume IV, Agricultural Co-operation No. 23, issue of November 8th, 1926). The business transactions of these associations "increased in volume, as measured in dollars, from Six Hundred, Thirty-six Million Dollars ($636,000,000.) to Two Billion, Four Hundred Million Dollars ($2,400,000,000.) during the ten-year period ending with 1925," according to the estimate of the Division of Co-operative Marketing of the United States Department of Agriculture, (Volume IV, Agricultural Co-operation No. 22, Issue of October 25th, 1926).

The President reported to Congress in his annual message on the state of the Union (December 7, 1926), that "Co-operative Associations reporting to the Department of Agriculture at the end of 1925 had on their membership rolls a total of 2,700,000 producers."

The plaintiff in error attacks the whole legal and constitutional foundation upon which successful co-operative marketing depends and upon which the modern movement to advance the welfare of the farmer rests.

For these reasons it is necessary to divide this "Statement of Facts" so as to include, *first*, an outline of the facts of the case at bar; *second*, an outline of the economic necessity for co-operative marketing with particular reference to the co-operative marketing of tobacco; and *third*, an outline of the Standard Co-operative Marketing Laws and the Standard Form of Con-

tract which form the foundation upon which the system depends.

A. The Case at Bar.

The Burley Tobacco Growers Co-operative Association brought this action to recover the penalty provided by law from the Liberty Warehouse Company for the action of said Company in knowingly persuading a member of said Co-operative Association to break his contract with the Association and sell his tobacco over the warehouse floor of said Company. (R. 1.)

The petition alleges that the Co-operative Association is a corporation organized under and conforming to the provisions of the Co-operative Marketing Act of the State of Kentucky known as "The Bingham Co-operative Marketing Act," passed January 10th, 1922, (Sections 883f-1-41, Carrol's Kentucky Statutes, 1924).

Substantially similar Co-operative Marketing Acts have been adopted in forty-two (42) states of the Union and are known and for convenience will be referred to in this brief as *Standard Co-operative Marketing Acts*.

The Association alleges that it entered into a contract with its members, who were growers of Burley tobacco, under the terms of which said growers agreed to deliver the tobacco produced by them to the Association for sale by said Association for a period of five years. A copy of the form of contract between the Association and its members is attached to the petition and appears in the record, (R. 4-10) and is printed as Appendix—of this Brief.

This form of contract, with variations to meet the needs of different commodities, is in general use between commodity co-operative Associations and their members throughout the United States and for convenience will

be referred to in this brief as the standard form of co-operative marketing contract.

The following facts appear in the petition:

Before the organization of plaintiff Association the tobacco market was subject to speculative manipulation.

Growers were frequently unable to realize the cost of producing and marketing their crops.

The entire industry of producing tobacco was extremely hazardous.

The plaintiff Association was organized to remedy this situation. The purpose of plaintiff Association is to provide for the orderly marketing of the products of its members through co-operation; to eliminate speculation and waste; to make the distribution of agricultural products between producer and consumer as direct as practical, and to stabilize the marketing of tobacco.

The plaintiff is precluded by law and by the terms of its contract from handling the tobacco of non-members.

The operations of the plaintiffs are without profit. The proceeds from sales made by it are paid to its grower members, less operating expenses, in proportion to the quantity and quality of deliveries made by the respective growers.

The Association sells the tobacco it receives from its members to manufacturers of tobacco in an orderly manner and in such times and in such quantities as the market can absorb the product.

The life and continued existence of the plaintiff Association and its ability to achieve its objects and purposes depends upon the performance by members of their contracts to sell and deliver tobacco to the Associaiton. Unless such contracts are performed, the plaintiff Association would be powerless to prevent manipulations of

the tobacco market; and would be unable to carry out the contracts made by the Association with manufacturers to whom it sold tobacco. Furthermore, the cost and expense of operating the plaintiff Association, which is borne by its grower members, would be materially increased by the non-performance of such co-operative contracts by members of the Association.

At the times named in the petition *Mike Kielman* was a member of the plaintiff Association. He signed a co-operative marketing contract similar to the standard form of contract and became bound to deliver to the plaintiff Association all of the tobacco produced by or for him as landlord or lessor, in accordance with the terms of said contract and said Co-operative Marketing law. Mike Kielman produced and acquired two thousand (2000) pounds of tobacco of the 1923 crop. When this tobacco was ready for the market, he did not deliver it to the plaintiff Association, but in violation of his contract, he delivered it to the defendant Warehouse Company. The Warehouse Company sold Kielman's tobacco at its looseleaf auction warehouse.

The Liberty Warehouse Company conducts a loose-leaf auction tobacco warehouse in the city of Maysville, Mason County, Kentucky. As a warehouseman, it receives and sells tobacco produced by growers at public auction. The defendant warehouse was directly responsible for persuading Mike Kielman to break his contract with the plaintiff Association. The Warehouse Company, when it induced Kielman to break his contract with the Co-operative Association, knew of the existence of such contract and knew that its action in persuading him to break his contract was a violation of the specific provisions of law.

Before the Warehouse Company sold the tobacco of

Kielman the following notice was served upon its active Manager C. M. Jones by the defendant in error:—

"This is to advise you that Buck Kielman is a member of the Burley Tobacco Growers' Co-operative Association, and that he is preparing to sell over your warehouse floor tobacco contracted to and belonging to said association.

I ask you, in the name of Burley Tobacco Growers' Co-operative Association, not to sell this tobacco for him and request that you read the following extract from the Bingham Co-operative Marketing Act passed by the Kentucky General Assembly and signed by the Governor January 10, 1922:

Sec. 26. Misdemeanor to Induce Breach of Marketing Contract of Co-operative Association; Spreading False Reports about the Finances or Management thereof.

Any person or persons or any corporation whose officers or employees knowingly induce or attempt to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association, or who maliciously and knowingly spread false reports about the finances or managements thereof, shall be guilty of a misdemeanor and shall be subject to a fine of not less than one hundred ($100) dollars, and not more than one thousand ($1000) dollars for each offense; and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred ($500) dollars for each offense.

Sec. 27. Warehousemen liable for damages for encouraging or permitting delivery of products in violation of marketing agreements.

Any person, firm or corporation conducting a warehouse within the State of Kentucky who solicits or persuades or permits any member of any association organized hereunder to breach his marketing contract with the association by accepting or receiving such members' products for sale of for auction or for display for sale, contrary to the terms of any marketing agreement of which said person or any member of the said firm or any active officer or manager of said corporation has knowledge or notice, shall be liable to the association aggrieved in a civil

suit in the penal sum of $500.00 for each such offense; and such association shall be entitled to an injunction against such warehouseman to prevent further breaches and a multiplicity of actions thereon. In addition, said warehouseman shall pay to the association a reasonable attorney's fee and all costs involved in any such litigation or proceedings at law."

(Signed) A. L. Halbhill.

December 12, 1923.

The petition specifically recites that after the service of the above notice and with full knowledge that Kielman had sold his tobacco to the Burley Association, the defendant "*knowingly persuaded*" Kielman to break his marketing contract. The petition reads:

> "Plaintiff says that after service of said notice and with the full knowledge that said tobacco had been sold to this plaintiff, the defendant knowingly persuaded and permitted the said Mike Kielman to breach his marketing contract with the plaintiff association by accepting and receiving the said member's product for sale and for auction and selling same contrary to the terms of said marketing agreement, contrary to the provisions of Sec. 27 of the Bingham Co-operative Marketing Act."

The provisions of Sec. 27 of the Co-operative Marketing Act are quoted in the petition which concludes with a prayer for the penalty provided in said Act, and for a reasonable attorney fee of $250.00 and its costs.

The facts set forth in the petition are not disputed anywhere in the record before this Court; and were not denied by the plaintiff in error.

The Warehouse Company demurred to the petition. (R. 11.) The demurrer was overruled. (R. 25.) The defendant then filed an answer and counterclaim. (R. 11-16.) The Trial Court sustained the demurrer of the Burley Association to the answer and sustained its motion to strike the counterclaim. (R. 18.) An amended answer and counterclaim was then filed. (R. 18-24.)

The amended answer of the defendant was in two paragraphs. The first paragraph alleged that the form of organization and the purpose underlying the plaintiff Association made it a combination in restraint of trade condemned by the common law.

The second paragraph of the amended answer alleged that the form of organization of the plaintiff Association was contrary to certain provisions of a prior Anti-trust Act of Kentucky. (R. 12.)

The alleged counterclaim is contained in paragraph 3 of the amended answer. (R. 12-16.) It alleges the passage of the Bingham Co-operative Marketing Act and the necessity for a *declaration of rights* under the *"Declaratory Judgment Law" of Kentucky.* The counterclaim further alleges that the Bingham Co-operative Marketing Act is invalid on the ground that it is contrary to the Constitution of Kentucky and to the Fourteenth Amendment of the Constitution of the United States and to the Sherman Anti-trust Act and the amendment of said Act, known as the Clayton Act. (R. 15.)

The defendant also alleges that the prosecution of the present action has injured its good name and that the operation of the plaintiff Association has damaged its business. The defendant claims three-fold damages in the sum of sixty thousand ($60,000) dollars, and concludes with the following prayer (R. 16):

> "Wherefore, defendant upon its counterclaim against plaintiff herein prays this court by its judgment to declare what its rights and duties under said Act of May 1890 and said Bingham Act of 1922 in relation to the constitutions State and Federal and the Sherman Anti-Trust law as amended; and that a judgment be entered declaring said Bingham Act of 1922 invalid, and for a judgment of treble damages under the Sherman Anti-Trust Law as amended in the sum of $60,000.00 and reasonable attorney's fee and costs and all proper relief."

It will be noted that *nowhere in the original answer or amended answer, and counterclaim, is there any denial or traverse of the allegations in the petition*, which must be taken as true.

The plaintiff Association demurred to the amended answer on the ground that no proper defense was pleaded to the action stated in the petition, and the plaintiff moved to strike the counterclaim on the ground that it was improperly pleaded in the present action.

The learned Circuit Judge sustained the demurrer of the Co-operative Associaiton to the amended answer, and sustained the motion to strike the counterclaim. (R. 25.)

The Warehouse Company declined to plead further and "*trial by jury being waived by the parties and the petition being submitted to the Court on the law and the facts,*" it was considered and adjudged "that plaintiff, the Burley Tobacco Growers Co-operative Association recover of defendant, the Liberty Warehouse Company, $500.00, and it was further adjudged that plaintiff recover of defendant as and for a reasonable attorney's fee $100.00 and that it further recover of defendant its costs herein expended."

From the above judgment the defendant below appealed to the Court of Appeals which found that there was no error in the judgment of the Circuit Court of Mason County, and ordered that said judgment be affirmed. (R. 31.)

The plaintiff in error (defendant below) attacks this judgment in twenty-two assignments of error. (R. 38-42.)

The second assignment of error attacks the entire standard form of co-operative marketing contract and alleges that the Bingham Co-operative Marketing Act approved January 10, 1922, is in conflict with the

Fourteenth Amendment to the Constitution of the United States.

Other assignments of error allege that the Co-operative Marketing Act is in conflict with Article I, Sec. 8 of the Constitution of the United States and with the Sherman Anti-Trust Law.

The plaintiff in error also alleges that the Court of Appeals erred in not holding that Section 27 of the Co-operative Marketing Act of Kentucky was unconstitutional and in not holding that the Burley Tobacco Growers Co-operative Association was an illegal trust and monopoly.

Thus, the legal and constitutional basis upon which the effort of the farmers of the United States to co-operatively market their products rests is brought before this Court, and it becomes important to consider the conditions which made the co-operative marketing of tobacco products in the tobacco producing states of the nation an economic necessity.

B. Outline of Facts in Connection With Co-operative Marketing of Tobacco.

Agriculture is the basic industry of the state of Kentucky and of many of the adjoining states. Tobacco is the basic agricultural product of Kentucky and of the neighboring states of Virginia and North Carolina. It is an important crop in Tennessee, Ohio, Indiana and West Virginia.

To a large extent the welfare of the people of Kentucky, Virginia and North Carolina depends upon the successful marketing of the tobacco produced in these states. The state of Kentucky is the leading tobacco producing state of the Union and from the earliest co-

lonial days, tobacco production has been intimately interwoven with the life of the state and has been the subject of constant and continuous legislation regulating its production, warehousing, sampling, weighing and marketing.

The extent to which the welfare of the state depends upon tobacco appears graphically from the following tables reproduced from the Year Book of the United States Department of Agriculture for the year 1924, page 822:

TOBACCO. ACREAGE, PRODUCTION, AND TOTAL FARM VALUE, BY STATES, 1922-1924.

STATE	Acreage			Production			Total value basis Dec. 1 price		
	1922	1923	1924	1922	1923	1924	1922	1923	1924
	1,000 acres	1,000 acres	1,000 acres	1,000 pounds	1,000 pounds	1,000 pounds	1,000 dollars	1,000 dollars	1,000 dollars
Massachusetts	9	9	9	9,612	12,600	11,700	3,633	5,558	3,160
Connecticut	28	29	28	29,260	40,252	36,820	11,792	18,717	11,893
New York	2	2	2	2,220	2,250	2,350	821	450	524
Pennsylvania	43	45	46	56,760	58,950	59,800	9,082	10,670	9,389
Maryland	26	27	28	20,020	21,384	21,420	3,504	6,009	5,762
Virginia	209	204	214	156,750	150,960	139,100	37,620	29,588	29,767
West Virginia	9	9	8	7,425	7,740	6,400	1,634	1,703	1,372
North Carolina	505	585	497	252,500	409,500	278,320	76,508	94,594	71,807
South Carolina	85	102	94	54,400	74,460	41,360	12,512	14,147	7,031
Georgia	11	17	41	5,940	11,237	31,201	1,544	3,483	8,299
Florida	3	4	7	3,300	4,292	5,600	1,551	2,185	2,106
Ohio	46	47	46	41,400	42,770	29,900	7,866	6,159	5,801
Indiana	18	22	21	16,200	19,778	17,417	2,754	2,769	3,057
Wisconsin	40	44	39	45,600	48,092	36,660	9,120	5,290	4,766
Missouri	5	6	6	4,500	6,600	6,000	1,305	1,848	1,500
Kentucky	525	578	503	446,250	494,190	419,585	87,019	82,036	71,757
Tennessee	130	146	130	94,250	109,500	97,500	20,735	15,658	18,135
Louisiana	1	1	1	450	465	400	248	232	220
United States	1,695	1,877	1,720	1,246,837	1,515,110	1,242,623	289,248	301,096	256,346

The conditions which existed prior to the formation of the present co-operative marketing associations are clearly set forth in the opinions of the courts which have had occasion to consider similar questions to those presented here. In the case at bar the Court of Appeals of Kentucky said:

> "We take judicial knowledge of the history of the country and of current events, and from that source we know that conditions at the time of the enactment of the Bingham Act were such that the agricultural producer was at the mercy of speculators and others who fixed the price of the selling producer and the purchasing price of the final consumer through combinations and other arrangements, whether valid or invalid, and that by reason thereof the former obtained a grossly inadequate price for his products. So much so was that the case that the intermediate handlers between the producer and the final consumer injuriously operated upon both classes and fattened and flourished at their expense. It was and is also a well-known fact that without the agricultural producer, society could not exist, and the oppression brought about in the manner indicated was driving him from his farm, thereby creating a condition fully justifying an exception in his case from any provision of the common law, and likewise justifying legislative action in the exercise of its police power." *Liberty Warehouse Company* v. *Burley Tobacco Growers Co-operative Association* (1925), 208 Ky. 643, 271 S. W. 695.

The conditions spoken of by the Court were caused by the effort of the individual farmer to market his tobacco in a market dominated by the large buyers of tobacco.

Under the system which prevailed prior to the formation of the co-operative associations there were only two methods of marketing tobacco. First, by sale to a buyer at the farm, and second, by sale at public auction on the floor of the loose-leaf warehouse. The first method, namely, the sale of tobacco to a buyer at the farm, was

not in general use. The second method, namely, the sale of tobacco at auction over the loose-leaf warehouse floor, was the only prevailing system of marketing just prior to the institution of co-operative marketing. Under this system the farmer brought his tobacco to the warehouse. It was then sorted, weighed and placed in loose-leaf baskets. The grading was arbitrary and not standardized. A card was placed on the basket showing the name of the owner, the weight and grade. The baskets were arranged in rows upon the floor of the tobacco warehouse preparatory to being sold at auction. At the time of the sale, the auctioneer (employed by the warehouse), accompanied by clerks (employed by the warehouse company), walked along the rows of tobacco and auctioned the baskets to the highest bidder. These sales were made very rapidly. Sometimes as many as two hundred forty (240) piles of tobacco were sold in an hour. It took but a few seconds to sell a basket of tobacco. As soon as the tobacco was sold a ticket was made out by the bookkeeper (also employed by the warehouse company), showing the name of the seller, the buyer, and the price at which the tobacco was sold. The tobacco was delivered to the buyer who ordinarily removed it at once. The owner was paid at once by a check, payable to bearer, which was cashed without endorsement. See "*Auction Methods of Selling,*" *History and Status of Tobacco Agricultural Year Book, United States Department of Agriculture*, 1922, Page 444.

Under the above method of marketing tobacco, the farmers all brought their tobacco to the auction warehouse at approximately the same time.

It was not intelligent marketing, but a blind dumping of the crop at one time so that the supply inevitably exceeded the demand at that time and place. Under this

system each farmer helped to break the current market for his own and his neighbor's tobacco.

There was little or no competition among buyers who, prior to the decision of this court in *United States* v. *The American Tobacco Co.* (1910), 210 U. S. 106, 55 L. Ed. 663, were organized as a trust or monopoly. Following that decision the trust was dissolved into its constituents companies. But in the Burley tobacco field there were and are only four large buyers. Approximately ninety (90) per cent of all Burley tobacco must be sold to one of these four companies, namely, the American Tobacco Company, Liggett & Myers, The Reynolds Tobacco Co. and The Lorillard Company.

Under the auction method of marketing, the producer was completely at the mercy of the buyers. Marketing was entirely disorganized. The law of supply and demand could not operate because of the dumping at approximately the same time of the entire crop. The result was that the growers of Burley tobacco were unable to secure a reasonable return for their labor.

This situation and the justification for earlier efforts to achieve co-operative marketing is ably pictured in the opinions of the Kentucky Court of Appeals in *Owen County Burley Tobacco Society et al.* v. *Brumback*, (1908) 128 Ky. 137, 107 S. W. 710; *Commonwealth* v. *Hodges*, (1910) 137 Ky. 233, 125 S. W. 689; *Louisville and Nashville Railroad Co.* v. *Burley Tobacco Society et al.* (1912) 147 Ky. 22, 143 S. W. 1040.

In *Owen County Burley Tobacco Society* v. *Brumback*, 128 Ky. 139, the Court of Appeals upheld an earlier Kentucky Act, permitting co-operative selling. The Court said that the conditions which gave rise to the Act "may with much propriety be considered," and stated these conditions are as follows:

"The farmers, scattered all over the state, each

acting independently and separately for himself, were unable to dispose of their crops at a fair and reasonable price. There was practically no competition among the purchasers of the crops. A combination and trust had been formed by the buyers to depreciate the value of the crops below their real value, and single-handed the producers were unable to combat or deal in terms of equality with these trusts and combinations that controlled the markets in which the farmer was obliged to dispose of his produce. To meet the condition of affairs thus presented, and to enable the farmers to combine their resources and place their products in the hands of an agent selected by them, to the end that better prices might be obtained, this act was passed."

In *Commonwealth* v. *Hodges*, 137 Ky. 233, the court in holding that a section of the earlier Act, similar to section 27 of the present Act, was not in violation of the Federal or State Constitution and laws said:

"The conditions which gave rise to the act are known of all men. At the time of its enactment there was but one buyer for the farmers' tobacco. It mattered not how hard he labored, how valuable his soil, or how fine the quality of the crop he raised, he was obliged to accept whatever that buyer might offer. Indeed in many instances the buyer, absolutely refused even to examine his crop, or to make any offer at all. Instead of the plenty to which he was accustomed, and to which he was entitled, he stood face to face with privation and want. *As individuals the farmers were unable to cope with the situation.* The General Assembly of the state of Kentucky, perceiving the straits to which the farmers were reduced by reason of the fact that the market for their products had been destroyed, and that their very livelihood—not to say comfort and prosperity—depended, not upon the market value of the products which they raised, but the caprice of one buyer, who gave, not what the articles were reasonably worth, but only that which he cared to give, deemed it wise to enact the law of 1906, authorizing the farmers to pool their products and select an agent to make the sales."

The earlier efforts to achieve co-operative marketing of Burley tobacco covered a limited period of time. At the end of that period the farmer was left to market his tobacco individually, as previously described. With the close of the World War this haphazard method of marketing tobacco combined with the deflation in agricultural prices brought the tobacco farmer to the brink of ruin, and many of the inhabitants of the state of Kentucky were threatened with impending bankruptcy. In this crisis the tobacco farmers of Kentucky determined to combine their resources and to form a co-operative association patterned after the successful co-operative associations of California and Denmark, for the purpose of stopping speculation, manipulation and dumping, and of providing an orderly method of marketing the current year's crop of tobacco and succeeding crops for a period of five years.

Approximately fifty-eight thousand (58,000) farmers joined in this effort during the first year and the number has increased from year to year until the association formed during the crisis of 1921 now numbers more than one hundred and twelve thousand (112,000) growers of Burley tobacco.

The best experience was utilized in order to place the Burley Tobacco Growers Association upon a sound, constitutional and legal basis, and to achieve the successful marketing of the major agricultural product of Kentucky. The association was first incorporated under the laws of the state of North Carolina. Subsequently the legislature of Kentucky passed the Bingham Co-operative Marketing Act, providing a detailed code for the incorporation, organization and government of co-operative marketing associations. The Burley Tobacco Growers Co-operative Association was then reincorporated under

the Bingham Co-operative Marketing Act and was organized in strict conformity with the detailed provisions of that law which is attacked in this case by the assignments of error.

The conditions in Kentucky described above are recited in *Section* 33 of the Bingham Act as follows:

> "Whereas, the agricultural interests of the State are of the utmost importance to the people of Kentucky; and
>
> Whereas, a demoralized condition of the farming interests of the State exists, injuriously affecting all other business; and
>
> Whereas, the highest interest of the State generally, demand immediate relief; and
>
> Whereas, this Act is designed and intended to afford such relief,
>
> Therefore, an emergency is declared to exist and this Act shall become effective immediately upon its passage and approval as required by law."

The history of the agricultural situation in the United States following the World War and leading to the adoption of the Bingham Co-operative Marketing Act and the standard marketing acts of forty-two (42) states is clearly set forth in the following opinions which sustain the legality of the defendant in error and the constitutionality of the standard co-operative marketing acts involved therein, namely,

Potter v. *Dark Tobacco Growers Association* (1923), 201 Ky. 441, 257 S. W. 33.

Liberty Warehouse Co. v. *Burley Tobacco Growers Co-operative Association* (1925), 208 Ky. 643, 271 S. W. 695.

List v. *Burley Tobacco Growers Co-operative Association* (1926), 114 O. S. 361, 151 N. E. 471.

Burley Tobacco Growers Co-operative Association v. *Gardner*, 25 Ohio N. P. N. S. 1.

Robertson v. *Dark Tobacco Growers Co-ope*
ative Association (1926), Ind. App. 150 N.
106.

Burley Tobacco Growers Co-operative Associ
tion v. *Rogers*, (1926) Ind. App. 150 N. E. 3

Northern Wisconsin Co-operative Tobacco Po
v. *Bekkedal et al*, (1923) 182 Wis. 571, 1
N. W. 936.

Minnesota Wheat Growers Co-operative Ma
keting Association v. *Huggins*, (1925) 1
Minn. 471, 203 N. W. 420.

Tobacco Growers Co-operative Association et
v. *Dunn*, (1924) 150 Tenn. 612, 267 S. W. 3

Dark Tobacco Growers Co-operative Associati
v. *Mason*, (1924) 150 Tenn. 228, 263 S. W. 6

Tobacco Growers Co-operative Association
Jones, (1923) 185 N. C. 265, 117 S. E. 174.

In *Tennessee ex rel. Thompson* v. *Burley Tobacc*
Growers Co-operative Association, decided by the Cou
of Appeals, Tennessee, July 24, 1926, *Affirmed and Wr*
of Certiorari denied by Supreme Court of Tennesse
January 15, 1927, not yet officially reported, the Cou
said:

"In our discussion of the facts we deem it prope
to set forth briefly the history of the organizatio
of this Association (Burley Tobacco Growers Co-op
erative Association). The Relator insists it is a
insidious, hurtful and unlawful combination mas
querading under the guise of altruistic and benef
cent purposes. It is clearly to be seen that the rapi
increase in raising Burley tobacco in Tennessee nec
essarily affected the industry everywhere else. Th
industry had not only grown rapidly in Kentucky
but had spread to the states of Indiana, Ohio, Mis
souri, and West Virginia, as well as to Tennessee.
In Tennessee the tobacco had been marketed largely
upon loose-leaf floors in the warehouses privately

owned and conducted. The policy of the four principal buyers had been to encourage the warehouses and commission men because under the loose-leaf system they were able to purchase tobacco at prices most nearly acceptable to them. Ever since the Association began to do business in Tennessee, the non-members have been able to get better prices on the loose-leaf floors than the members derived through the Association, because of this preference accorded by the buyers. The warehouse men in Knoxville at first charged the grower one-half of all over eight cents per pound which the tobacco would bring. Afterwards they charged fifteen cents a basket plus fifteen cents a hundred pounds, plus three per cent of the selling price. It is not shown whether or not these charges amounted to as much to the grower as what was taken out by the Association for expenses including two-fifths of a cent a pound for a fund for purchase of warehouses in Tennessee only, for which the grower received common stock in the subsidiary corporation of the Association. * * *

In the years 1919 and 1920, Burley tobacco brought abnormally high prices due to the war situation, but in January, 1921, when the 1920 crop was being marketed, the market completely collapsed. Burley tobacco sold on the market in January, 1921, at as little as less than one cent per pound, when the average for the previous crop had been about thirty cents per pound. This collapse paralyzed the whole section in which Burley tobacco was being raised. At that time very little Burley tobacco was being raised in Tennessee. Many people in Kentucky, stimulated by the high prices received in 1919 and 1920, had bought lands at very high prices, had made their first payments expecting to make their succeeding payments out of the proceeds of the crop of 1920. *Very many people lost their all in these investments because they were unable to make their payments and they lost what they had already paid. It was a crisis involving the welfare of many thousands of people.* Judge Robert W. Bingham, proprietor of the Louisville Courier Journal and the Louisville Times, made an investigation of Co-operative Marketing Associations, especially in Cali-

fornia, *ascertaining that through the methods of these Associations there had been great prosperity in the fruit raising and other industries in California.* * * *

The Court describes the organization of the Burley Tobacco Association under experienced legal guidance and continues:

> Judge Bingham loaned a large sum of money to the Association when it was organized. Much of this money was used in making advances to the growers on their crops. Through a subsidiary corporation issuing eight per cent preferred stock, the Association was able to acquire one hundred and twenty-four of the one hundred and twenty-six warehouses in the Burley district in Kentucky. Banks and other financial institutions co-operated. In January, 1922, the Association advanced about ten cents a pound to its members on the tobacco delivered by them to its warehouses. For the balance it gave, and does give, participation certificates. It is said by Judge Bingham, in his testimony, *that the effect of the work of the Association was to lead from bankruptcy to prosperity.* He also testified that since the Association has been organized and has raised the price of tobacco, *the price of the manufactured product has gone down, but the reports show that the manufacturers have been able to make a good profit. The weight of the evidence seems to sustain this conclusion.* This being true, the charge in the bill in this cause that the effect of the work of the Association is to raise the price to the consumer, is not sustained. It may not be entirely due to the work of the Association, *but the elimination of the middleman and other economic wastes ought certainly to have a tendency to reduce the price to the consumer, although the price to the grower has increased.* Judge Bingham also testified that it had never been the purpose or intention of the Association, or its managing officers, to limit the production of Burley tobacco in Kentucky, that any attempt of that kind would defeat the purpose of the Association to market the tobacco in such an orderly way as to get a fair price for it; and that if the Association should attempt to

get an unfair price its whole purpose would be defeated. He further testified that the Association had put forth every effort to improve the quality of the tobacco.

* * * * * *

It appears that the price of Burley tobacco for the 1920 and 1921 crops, together, averaged 13.37 cents per pound. The cost of raising tobacco is about twenty cents per pound. Under the operations of the Association the growers have received twenty-two cents to twenty-eight cents per pound. Mr. Stone testified that following the organization of the Association and after the year 1923, *the production was doubled, and the prices to the consumer have decreased probably twenty to twenty-five per cent; and yet that in the past three years the manufacturers have had in earnings at least from twenty to twenty-five per cent more than they received before the Association came into existence.* It was estimated by Judge Bingham that during its first year of operation the Association did $50,000,000 worth of business and *increased the profits of its members by* $40,000,000. It further appears that there was a very rapid increase in acreage of Burley tobacco in Tennessee from 1920 to 1924.

* * * * * *

Under the Co-operative Marketing System, the tobacco is placed together in warehouses according to grades. Of course, the price received depends upon the grade of the tobacco sold. Under the loose-leaf system, the grading is done arbitrarily by representatives of the buyers. Under the Co-operative system the growers are protected against arbitrary or oppressive treatment by the buyers. The classification has been set under government supervision.

When we consider that the prices already received have not been unreasonable, that the prices paid by the consumer have been less than before and that the buyers have enjoyed an increase in profits, we are at a loss to find any facts indicating either that the Association has held up the market at unreasonable prices or that it will do so. This very proposition was necessarily involved in the Mason and Dunn

cases and a fair interpretation of the holding of our Supreme Court is that the existence of this power in the hands of the general manager, supported by a Board of Directors, does not render the Association illegally monopolistic."

In *List* v. *Burley Tobacco Growers Co-operative Association*, 1926, 114 O. S. 361, the Supreme Court of Ohio held that the defendant in error was not organized or operated contrary to the Anti-trust laws of the state or nation, and that the standard form of co-operative marketing act was constitutional. In connection with the facts discussed above the court said that it is apparent that "the business of raising tobacco has not been concentrated into the hands of a few persons. More than one hundred thousand (100,000) growers are in the pool, but one-fourth of all the growers are outside of the pool and it is apparent that those who are outside are getting as good prices for their product as those who are within the pool. It is apparent that the pool is not able to control prices. * * * The number of growers of Burley tobacco is not made to appear in this record but it is indicated that *there are only four manufacturers of any consequence*. Whether or not there are a larger number than four is not material because it is quite certain that the number of manufacturers of Burley tobacco is quite limited and the number of growers is quite large."

In *Potter* v. *Dark Tobacco Growers Co-operative Association*, 201 Ky. 441, the Court of Appeals of Kentucky said that "the fact that farmers, if unorganized, necessarily act as individuals and not as groups in marketing their products, results in 'dumping' by the farmers, distribution by speculators, an unconscionable and uneconomic spread between producer and consumer in the necessities of life, and an inevitable demoralization of basic economic conditions, to the hurt directly or indirectly of every citizen.

With a clear recognition of this fact borne in upon the public conscience by the threatened economic collapse of the farming industry indispensable to public welfare and national stability, if not national existence, an enlightened public opinion unmistakenly demands that farmers be permitted to organize for the marketing of their crops, not merely for their own protection, but for the public good."

In *Minnesota Wheat Growers Co-operative Marketing Association* v. *Huggins*, 162 Minn. 471, the Supreme Court of Minnesota summarizes the situation of agriculture after the World War:

> "Subsequent to the World War the returns to the farmer were pitifully inadequate. His lands depreciated in value. The things he had to buy did not depreciate proportionately. His condition was critical. The state, and in fact the government, responded to a sympathetic co-operation in an economic rehabilitation of the stability of the agricultural interest. The policy of our nation is apparent in exempting agritultural organization, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, from the operation of the Sherman Anti-Trust Act (section 8835f, U. S. Comp. Stat.); also by chapter 57, 42 U. S. Stat. at Large, adopted Feb. 18, 1922, p. 388 (U. S. Comp. St. Ann. Supp. 1923, §§ 8716½, 8716½a), which act, like the one under consideration, provides for government supervision. It is for the interest of our social, moral, and financial welfare that the producers in our state be able to materially succeed, so that they may enjoy and be inspired by reasonable success and achievements, and thereby be the better enabled to properly carry on the duties of citizenship. It was clearly to this end that this law was enacted. About three-fourths of our states have now enacted such laws. Co-operative associations are favored by our laws."

In *Tobacco Growers Co-operative Association* v. *Jones*, 185 N. C. 265, the Supreme Court of North Carolina de-

scribes in forceful language the conditions that made the present system of co-operative marketing an economic necessity. The court said:

> "When the World War ended there was a scarcity amounting almost to destitution in some sections, and in others there was so great an abundance that the producers could not obtain a reasonable living. For the producers of agricultural products the prices were low and there was no profit. To the consumer prices were so high that consumption was restricted and something like famine prevailed. These extremes existed in the same country and at no great distance apart. Middlemen, speculators, and people who stood between the producers and laborers were denied a living, and from the consumers were extorted enormous profits. It was the heyday of profiteering.
>
> *The co-operative marketing system was forced into existence to guarantee fair prices to the producer, a fair wage for labor, and to prevent extortion upon the consumer. It increased consumption, by furnishing the consumer a regular supply at less price, and at the same time enabled the laborer and the farmer to obtain a remunerative return. In addition, the co-operative system eliminated unnecessary expenses and costs, as well as the enormous speculative profits realized by combinations which had taken control of the entire process between the producer and the consumer.*"

The court speaks of the co-operative system as the most hopeful movement inaugurated to improve the financial condition of the farmers. In this connection the Chief Justice said:

> "In fact, the co-operative system is the most hopeful movement ever inaugurated to obtain for, and improve the financial condition of farmers and laborers. The producers are paying all the costs and assuming all the responsibilities of these co-operative associations. They are forcing no one to join, and they are exacting no inordinate prices for their product. They are associating themselves as authorized by the statute, like other persons, and they

have signed mutual and fair agreements among themselves, which will be futile unless those who have signed such agreements can be held to abide by the terms of their contracts."

The court refers to the history of co-operative marketing as follows:

"From year to year, the movement towards the co-operative marketing of farm products is assuming greater scope and greater economic importance. On the Pacific Coast the large fruit growers co-operative have become by far the most important factors in the marketing of citrus fruit, raisins, and grapes, prunes and apricots, and similar products. The annual turnover of co-operative associations in California alone is approximately $300,000,000. In the wheat and corn belts, co-operative country grain elevators have been a familiar feature for a generation, and their importance is said to be growing. Co-operative creameries and cheese factories play a significant part in the economy of dairy farming in the Middle West. Associations of potato growers, of truck gardeners, of growers of berries, apples, and vegetables, for canning or direct consumption, have been known for years. It was estimated that in 1920 there were at least 14,000 farmers' buying and selling associations in the United States. In an earlier estimate the annual business of co-operative marketing associations in the United States was placed at about $1,000,000,000."

The court takes up the history of such associations following the agricultural crisis in 1921 and says:

"In 1921 such associations were organized in Texas, Oklahoma, Mississippi, and Arizona to market cotton, and in Kentucky to market tobacco; and in 1922 cotton associations were organized in Arkansas, Alabama, Georgia, and North and South Carolina, and a tobacco association (the plaintiff in this case) covering North and South Carolina and Virginia, and other tobacco associations in Wisconsin, in the Connecticut Valley, and in Kentucky. Wheat growers' associations were organized in Oregon, Washington, Idaho, and Montana in 1921, and in

> Texas, Oklahoma, Kansas, and Nebraska in 1922, and if is estimated that such associations will handle during the present year 2,000,000 bales of cotton (worth at present prices $300,000,000) and more than 75 per cent of all the tobacco. Rice growers' associations, this same article states, are operating in California, Arkansas, Louisiana, and Texas, and the peanut growers' association in Virginia handles over a million dollars worth of peanuts annually. These associations have become necessary, not only as a matter of justice, but also as a matter of existence, to the producers of the great staples of the country, and as a protection against the gigantic combinations of capital which have been taking all the profits, or more, which should have gone to the producers of the great staple crops of the country, and to furnish a reasonable decent wage for the laborers in such industries."

In *Northern Wisconsin Co-operative Tobacco Pool* v. *Bekkedal*, 182 Wis. 571, describes the conditions leading to adoption of co-operative marketing as follows:

> "The reasons for promoting such legislation are generally understood. It sprang from a general, if not well-nigh universal, belief that the present system of marketing is expensive and wasteful, and results in an unconscionable spread between what is paid the producer and that charged the consumer. It was for the purpose of encouraging efforts to bring about more direct marketing methods, thus benefiting both producer and consumer, and thereby promoting the general interest and the public welfare, that the legislation was enacted."

Upon rehearing the court referred to the history of co-operative marketing and the public policy of the national government and of the states as evidenced by legislation to promote and encourage the formation of co-operative organizations. The court said:

> "Co-operative associations are neither new nor novel to civilization. They are old institutions in many foreign countries, notably in Denmark. It is well known that the United States Department of

Agriculture has been active for some years in the encouragement and development of co-operative marketing associations. The War Finance Corporation, another government agency, has encouraged these associations throughout the country. Many acts of Congress have accorded special consideration to such associations, such as the Income Tax Law, the Sherman Anti-Trust Act (U. S. Comp. St. §§8820-8823, 8827-8830), the so-called Capper Volstead Act, approved February 18, 1922 (U. S. Comp. St. Ann. Supp. 1923, §§ 8716½, 8716½a), and the Agricultural Credits Bill, approved March 4, 1923 (42 Stat. 1454). State departments of agriculture throughout the country have urged the formation of such associations, and at least 20 states of the Union have adopted co-operative marketing laws. Their function is to enable co-operation among the weaker and more scattered members of society, and this on the theory that the welfare of society as a whole is promoted by enabling the weaker members thereof to co-operate for the purpose of improving their condition, which is humble at the best. It is this theory which was wrought a change of governmental attitude towards the collective efforts of laboring men, which evolution is clearly pointed out in the dissenting opinion of Mr. Justice Brandels in *Truax* v. *Corrigan*, 257 U. S. beginning at page 354, 42 Sup. Ct. 124, 66 L. Ed. 254."

The successful results of the institution of co-operative arketing as contrasted with the wasteful "dumping" hich prevailed prior thereto, are referred to by the Sueme Court of Tennessee in *Dark Tobacco Growers Coerative Association* v. *Dunn*, 150 Tenn. 612, as follows:

"Giving the act full faith and credit, and taking into consideration the history of co-operative associations, it appears that the purpose is to reduce rather than increase the price paid by the consumer, and thereby create a demand for larger quantities of farm products. The object sought is an increased return to the producer by eliminating speculation and waste, obviating dumping, reducing freight rates, marketing in an orderly and economic manner, making the distribution of agricultural prod-

ucts between producer and consumer as direct as can be efficiently done, studying marketing problems from the standpoint of the consumer, and creating new markets.

Statistics show that the price paid by the consumer for farm products is sufficiently high, but that the producer receives only 35 per cent of this sum, the middleman (so to speak) receiving 65 per cent. One of the main objects of the association is to bring about a more just apportionment of the price paid by the consumer. The righteousness of this claim on the part of the producer is generally conceded.

Economists agree that the farmer can only obtain a fair price for his produce by group marketing or co-operation. By co-operation the *per capita* consumption of California oranges in America was doubled in 16 years. This was accomplished by proper grading, packing, orderly marketing, and by extensive advertising. The California Fruit Growers' Exchange spent for advertising last year $875,000. But for co-operation increased consumption by means of advertising would have been impossible. By co-operation $3,000,000 a year in freight was saved, and the total cost of selling and advertising for 1923 amounted to but 2.49 per cent of the value of delivered fruit." * * * "From the article referred to above it appears that there are 10,000 co-operatives in operation in this country that did a business of $2,200,000,000 in 1923.

We are impressed with the idea that co-operative marketing of farm products is an economic necessity. It was championed by all three parties in the recent national political contest. It has been enacted into law by the Congress of the United States (The Capper-Volstead Act (U. S. Comp. St. Ann. Supp. 1923, §§ 8716¼, 8716¼a)), and by the Legislatures in two-thirds of the states."

The Ohio Court of Appeals summed up the situation accurately in its opinion, affirmed by the Supreme Court in *List* v. *Burley Tobacco Growers Co-operative Association*, 114 O. S. 361, as follows:

"The whole tendency of later day legislation and administration has been to secure co-operative mar-

keting among farmers. This is true of federal legislation and state, and some of the Ohio statutes to that end have already been referred to. We know as a matter of common knowledge that as the result of the government's activity vast interests in this line have been built up by various agricultural associations in some at least of the communities where the plaintiff association functions. The milk producers have an association by which their mingled product is delivered to consumers thru a single agency. The fruit growers have an association by which their apples are brought to a center where they are sorted and graded, to the end that the standardized fruit may be sold by an association acting for all members thereof. The wool producers are similarly organized.

There is much more reason for an association of Burley tobacco growers than for one of fruit growers or milk producers. The number of milk producers and apple growers is limited only by the population of the world. These commodities are practically ready for consumption upon their production. Tobacco and wool, on the other hand, are practically unfit for use in the state in which they are produced. Both require manufacturing, and the number of manufacturers is limited. We do not assume, as have some courts, that the manufacturers of tobacco are in a combination to avoid competition for such assumption would be to assume that the law was being violated. It is interesting to observe, however, that there was a time when such combination was scarcely disputed, and that it was in the prosecution of such a combination that the Federal Supreme Court again held that it was only undue obstruction of trade that constituted a violation of the Sherman Law. *United States* v. *American Tobacco Co.*, 210 U. S. 106.

In any event, the number of domestic purchasers of raw tobacco is limited, and as a matter of common knowledge we take it as beyond dispute that in foreign countries there are state monoplies of tobacco that have the effect to diminish the number of purchasers in foreign markets. Moreover, the quality of raw tobacco widely varies. In fact, there would seem to be a greater variation in the quality

of this product than of any other known to us. A producer of a modest crop may find that his crop consists of literally dozens of grades. It requires expert knowledge so sort a crop, getting like qualities separated from tobacco of dissimilar qualities. The grower not only lacks the knowledge necessary to properly sort and grade his own product, but if he could do so he would have so many different grades in a modest crop that he could only advantageously dispose of his crop by securing such different purchasers for the different grades as should happen to be interested in a particular grade. These suggestions, based on common knowledge, warrant us in saying that there are the strongest of reasons why those engaged in growing tobacco should be permitted to pool their tobacco for sale thru a common agency, and that such pooling far from tending to destroy commerce, tends to promote it, and that such pooling is not only within the spirit of modern legislation, but without such legislation would until a more satisfactory method is established constitute a well nigh indispensable step in the transportation and marketing of this product under such conditions as would afford the grower a fair opportunity to sell his product under fair and equal conditions.

We conclude, therefore, that the contract by which the growers pool their interests for the very useful and natural purposes referred to is not necessarily a violation of any of the provisions of the anti-trust act of this state, and for this reason the contract sued upon does not upon its face disclose any purpose or object of forming any illegal combination. The demurrer to the petition was properly overruled."

From the above decisions it appears that prior to the institution of co-operative marketing the tobacco growers were at the mercy of the buyers of tobacco; that the process of dumping tobacco forced the price to the farmer down; that the auction method of selling enabled a limited number of buyers to dictate the prices; that the prices were below the cost of production and were

insufficient to enable the farmers to maintain a proper standard of living and did not yield a fair return for their labor; that these conditions culminated after the World War in a complete paralysis of tobacco marketing in Kentucky; that to bring relief to the poverty-stricken farmers and the bankrupt state of Kentucky, the growers of that state combined their resources and formed the Burley Tobacco Growers Co-operative Association for the purpose of stopping dumping, preventing manipulation and speculation, and of marketing their tobacco in an orderly business-like way.

It further appears from the above cases that the Burley Tobacco Growers Co-operative Association succeeded in accomplishing its purposes and has provided a successful and orderly method of marketing tobacco and has secured for the farmer a fair return for his crop without impairing the profits of the manufacturer or increasing the cost of tobacco to the ultimate consumer. Thus, to quote the language of the Court of Appeals of Tennessee in *Tennessee ex rel Thompson* v. *Burley Tobacco Growers Co-operative Association*, the state of Kentucky has been brought from "bankruptcy to prosperity."

The price of tobacco to the ultimate consumer has been reduced from 10 to 25 per cent, and the amount received by the farmer has increased from the low levels of 12c and 13c in 1921, prior to the formation of the defendant in error, to approximately 20c a pound. At the same time the profit of the manufacturer has shown a fair increase from year to year.

These results have been accomplished by the elimination of waste, by making marketing as direct as possible between producer and consumer, by opening new markets, and by stopping speculation and manipulation.

The marketing of Burley tobacco, through the efforts of the Burley Tobacco Growers Association, has been placed upon a business basis. Dumping has been stopped. Orderly marketing has taken its place. The law of supply and demand has become effective and the Association has been able (1) to prevent the glutting of markets and (2) to adjust supply to demand.

This adjustment could not be made by a single farmer; nor by a local association or even a small group of locals. But it could be made—and could only be made—by farmers organized on a community basis and certain of controlling the sale of a large percentage of the commodity and of guiding the flow of that commodity into the markets of the world.

The Association has succeeded in establishing standard grades and providing a system of grading approved and adopted as standard by the United States government. The Association has also succeeded in securing and maintaining its own warehouse facilities and its own plants for redrying and processing tobacco.

Judicial approval has been given to the work of the Association by the Appellate Courts of Kentucky, Ohio, Indiana and Tennessee in the cases above cited where attacks were made against the Association and a complete record was before the court. The best evidence as to the satisfactory and successful work of the Association is the increase from year to year in the number of farmers who have become members.

The success of this movement would not be possible except for the firm legal foundation upon which it rests. If warehouses, redrying and packing plants are to be built there must be a certainty of paying for and maintaining them. If community co-operatives are to advertise and sell, often in advance of delivery, they must be

sure that farmers will deliver their crops. Thus the necessity for a binding contract develops and it becomes important to consider the standard form of co-operative marketing law and the standard form of co-operative marketing contract which contain the essentials without which these voluntary co-operative associations, organized without capital and operated without profit, could not hold together and successfully market the products of their members.

C. Outline of Standard Co-operative Marketing Law.

Standard co-operative marketing acts have been adopted in 42 states of the Union.

The purpose of these laws is stated in the *Bingham Co-operative Marketing Act, Section* 1, as follows:

> "(a) In order to promote, foster and encourage the intelligent and orderly marketing of agricultural products through co-operation; and to eliminate speculation and waste; and to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done; and to stabilize the marketing of agricultural products, this Act is passed."

These laws are substantially similar and constitute a detailed code for the incorporation, organization and government of co-operative marketing associations.

These laws embody the best thought of students of co-operative marketing and the result of years of co-operative experience.

The various sections of the law may be likened to cogs of an economic machine designed to promote agricultural welfare in the United States.

Each of these cogs is essential to the successful functioning of this economic machinery and has its particular part to play in the delicate business mechanism of col-

lective or group marketing on a non-profit and non-capital basis.

If any one of these sections or cogs is broken, the smooth functioning of the co-operative machinery will be seriously impaired and the entire structure endangered.

For these reasons a proper consideration of the present case requires a consideration of the entire system which Congress and the Legislatures of the several states have provided to enable the farmers of the United States to co-operatively purchase, store, process, finance, advertise and market the products of their labor.

To enable the court to examine and compare the co-operative marketing acts adopted by the several states, we have prepared and include herein as an appendix, a chart in which the sections of the various state laws are placed in column form opposite the corresponding section of the Bingham Co-operative Marketing Act which is directly involved in this case.

The Co-operative Marketing Acts of the several states referred to herein are listed below:

Alabama. Laws of Alabama Special Session, 1921, No. 31, Approved Oct. 29, 1921.

Arizona. Session Laws of Arizona 1921, Chapter 156, Approved March 22, 1921.

Arkansas. General Acts of Arkansas, 1921, Act 116, Approved Feb. 14, 1921.

California. Laws of California, 1923, Chapter 105, Approved May 4, 1923.

Colorado. Session Laws of Colorado, 1923, Chapter 142, Approved March 30, 1923.

Connecticut. Public Acts of Connecticut, 1923, Chapter 251, Approved June 1, 1923.

Florida. Laws of Florida, 1923, Chapter 9300, Approved June 7, 1923.

Georgia. Laws of Georgia, 1921, No. 279, Approved ug. 15, 1921.

Idaho. Session Laws of Idaho, 1921, Chapter 124, Approved Feb. 25, 1921.

Illinois. Laws of Illinois, 1923, p. 286 (Senate Bill 65), (Smith Hurd Ill. Revised Statutes, Chap. 32, Sec. 40-472), Approved June 21, 1923.

Indiana. General Laws of Indiana, Acts of 1925, hapter 20, Approved Feb. 23, 1925.

Iowa. Laws of Iowa, 1921 (41 G. A.), Chapter 122, pproved April 5, 1921.

Kansas. Laws of Kansas, 1921, Chapter 148, Approved March 21, 1921.

Kentucky. Acts of Kentucky, 1922, Chapter 1, Approved Jan. 10, 1922.

Louisiana. Acts of Louisiana, 1922, Act. No. 57, Approved July 13, 1922.

Maine. Public Laws of Maine, 1923, Chapter 88, Approved March 24, 1923.

Maryland. Laws of Maryland, 1922, Chapter 197, Code of Public General Laws of Maryland, Art. 23, Sections 469 to 496), Approved April 13, 1922.

Massachusetts. Acts of Mass., 1923, Chap. 438, Sec. Approved May 23, 1923. (General Laws, Mass., Chap. 7, Sec. 10-18).

Michigan. Public Acts of 1921, Act 84, Chapter 4, Approved April 26, 1921.

Minnesota. Laws of Minnesota, 1923, Chapter 264, pproved April 16, 1923.

Mississippi. Laws of Mississippi, 1922, Chapter 179, pproved March 2, 1922.

Missouri. Laws of Missouri, 1923, (C. S. H. B. 439), page 111, Approved April 9, 1923.

Montana. Laws of Montana, 1921, Chapter 233, Approved March 3, 1921.

Nebraska. Session Laws of Nebraska, 1925, Chapter 79, Approved March 13, 1925.

Nevada. Statutes of Nevada, Chap. 236, Approved March 23, 1921.

New Hampshire. Laws of New Hampshire, 1925, Chapter 33, Approved March 19, 1925.

New Jersey. Laws of New Jersey, 1924, Chapter 12, Approved Feb. 28, 1924.

New Mexico. Laws of New Mexico, 1925, Chap. 99, Approved March 17, 1925.

New York. Laws of New York, 1924, Approved May 5, 1924, Chapter 616.

North Carolina. Public Session Laws of North Carolina, 1921, Chapter 89, Approved March 7, 1921.

North Dakota. Session Laws of North Dakota, 1921, Chapter 44, Approved March 10, 1921.

Ohio. Laws of Ohio, 1923, page 91, Approved April 13, 1923; Ohio G. C., sec. 10186—1 to 30.

Oklahoma. Session Laws of Oklahoma, 1923, Chapter 181, Approved March 19, 1923.

Oregon. Laws of Oregon, 1915, Chapter 226; 1917 Chapter 411; 1921, Chapter 490.

Pennsylvania. Laws of 1919, No. 238, Approved June 12, 1919.

South Carolina. Acts of South Carolina, 1921, No. 203, Approved March 29, 1921.

South Dakota. Laws of South Dakota, 1923, Chapter 15, Approved Feb. 27, 1923.

Tennessee. Public Acts of Tennessee, 1923, Chapter 100, Approved March 31, 1923.

Texas. General Laws of Texas, 1921, Chapter 22, Approved March 1, 1921.

Utah. Laws of Utah, 1923, Chapter 6, Approved Feb. 8, 1923.

Virginia. Acts of Assembly of Virginia, 1922, Chapter 48, Approved Feb. 18, 1922.

Washington. Session Laws of Washington, 1921, Chapter 115, Approved March 18, 1921.

West Virginia. Acts of West Virginia, 1923, Chapter 53, Approved May 2, 1923.

Wisconsin. Wisconsin Statutes, 1921, Sec. 1786 e1-17a.

Wyoming. Session Laws of Wyoming, 1923, Chap. 83, Approved March 1, 1923.

From an examination of the Bingham Co-operative Marketing Law it will be apparent that *Section* 27, under which the present action was brought in the court below, is an essential part of the co-operative marketing system and is necessary to preserve the inviolability of the co-operative marketing contract upon which the entire system depends.

An examination of the provisions of the Bingham act shows that there are certain fundamentals upon which the present co-operative organization of farmers is based.

Prior to about 1916 co-operative marketing was mainly confined to small localized units dealing with the products of a particular locality and not with an entire commodity. The principle of commodity co-operation is of recent development. The application of the principles

of co-operation to an entire commodity such as cotton, tobacco, and wheat—regardless of locality—has involved a new interpretation of economic principles.

These principles were not known at the time the Connolly case was decided by this court in 1902. Since that time there has been a definite change in our economic conceptions with respect to the position of agriculture as a special group characterized by individual production, in contrast to group production which characterizes other forms of industry, and this change has led to the adoption of the recent Co-operative Marketing Statutes.

In view of this new interpretation of the position of agriculture from the economic side, it is necessary to revise our legal principles to conform to present economic conditions.

In *Section* 5 of the Bingham Act and corresponding sections of other acts, this new conception of agriculture is recognized and the act declares that since Agriculture is characterized by individual production, in contrast to the group or factory system that characterizes other forms of group production, the ordinary form of corporate organization which permits industrial groups to combine for the purpose of group production and group marketing must be supplemented by a new type of corporate organization which takes into consideration this difference and which will enable farmers to bring their industry to the high degree of efficiency and merchandising skill evidenced in the manufacturing industries and which will substitute a direct and efficient system of marketing for the blind, unscientific and speculative selling of crops.

In order to accomplish these purposes and at the same time to prevent the possibility of the co-operative organizations authorized by the acts becoming detrimental

to the public, a complete code to govern such associations and to safeguard the public interest is contained in the act.

The chief characteristics of the co-operative associations authorized by the standard co-operative marketing acts are that such associations are *non-profit*, and in the language of *Section* 2 "are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers."

Membership in such association is *limited to the producers* of agricultural products. (Section 7.)

Thorough *democratic control* of such associations is assured by the law which provides that "No member or stockholder shall be entitled to more than one vote, regardless of the number of shares of common stock owned by him." (Section 14.)

The purposes and powers of the Association are *limited to handling the products of its own members* and it is prohibited by law from handling the products of non-members. (Sections 4, 6.)

Section 10 requires the Association to adopt a code of by laws for its government and management within thirty days after its incorporation, in accordance with the provisions of the Co-operative Marketing Act.

Section 11 *safeguards minority rights* by providing for special meetings upon the request of ten per cent of the members.

Section 15 provides for the removal of officers or directors and that any members may bring charges against an officer or director; and *Section* 16 provides for a referendum of the entire membership upon demand of one-third of the Board of Directors.

There are detailed provisions as to the election of di-

rectors and officers to insure that every district will have *adequate representation* upon the board of directors and to provide for their *fair nomination* and *election*. (Sections 12, 13.)

Adequate *public representation* upon the board of directors is assured by *Section* 12 which provides for the appointment of certain public directors. The law specifically provides that "*Such directors shall represent primarily the interest of the general public in such associations.* The director or directors so appointed need not be members or stockholders of the association; but shall have the same powers and rights as other directors."

Additional public supervision is provided in Section 20, which requires each association to prepare and file with the Dean of the College of Agriculture of the University of Kentucky an annual report on forms to be furnished by it giving detailed information as to all the business operations of the association during the preceding year.

The directors are prohibited from making any profit by reason of their official position "differing in any way from the business relations accorded regular members or holders of common stock of the association or others or differing from terms generally current in that district." (Section 12.)

These and other provisions insure that all members will be treated *equally* with respect to voting and with respect to the terms, conditions and the return for products delivered to the association for sale.

The law definitely contemplates the making of a marketing contract by the co-operative association with its members. That contract is the heart of the association, and its terms are authorized by *Section* 17 of the Co-operative Marketing Act. This section provides that the as-

ociation may make marketing contracts requiring the embers to sell for not more than *ten* years, all or part f specified agricultural products exclusively to or hrough the association. In case they contract a sale to e association, the law provides it shall be conclusively ld that title to the products passes absolutely and unservedly, except for recorded liens, to the associon and that the association may "sell or resell the roducts delivered by its members, with or without takg title thereto; and pay over to its members the resale rice, after deducting all necessary selling, overhead d other costs and expenses, including interest on prerred stock, not exceeding eight (8) per cent per annum, d reserves for retiring the stock, if any; and other roper reserves; and interest not exceeding eight (8) per nt per annum upon common stock."

Since the association has no capital and cannot deal the products of non members, it is absolutely dependt for its life and existence upon members who sign ch marketing contracts delivering their products to e association in accordance with the terms of such conacts.

The legislatures of Kentucky and of the 42 states of e Union which have adopted co-operative marketing cts all recognized that the success of co-operative arketing was entirely dependent upon the performnce of such marketing contracts and the delivery to the ssociation of the products sold to it under the terms of ch marketing agreements.

Therefore, these acts contain provisions to protect the ontract from breach and to provide remedies to secure s performance.

The remedies for breach of the contract are set forth *Section* 18 of the Bingham Act and in corresponding

sections of the other Acts. Three remedies are provided: (a) liquidated damages; (b) an injunction to prevent a breach or further breach of a contract; and (c) a decree of specific performance.

The protection of the contract against third persons who endeavor to induce a member to breach his contract and thereby destroy the effectiveness and success of co-operative marketing and imperil the welfare of the other members of the association is contained in *Sections* 26 *and* 27 of the Bingham Co-operative Marketing Act and similar sections of the acts of other states.

Section 26 provides that any person who knowingly induces or attempts to induce a member of an association to break his marketing contract, or who maliciously and knowingly spreads false reports about the finances or management of an association organized in accordance with the Act shall be guilty of a misdemeanor; subject to a fine for each offense; and shall be liable to the association aggrieved in a civil suit in the penal sum of $500.00 for each offense.

Section 27, under the terms of which the present action was brought by the defendant in error, provides that any person conducting a warehouse within the state who solicits or persuades a member of an association organized in accordance with the act, to breach his marketing contract with the association and who accepts and receives such member's products for sale or for auction, contrary to the terms of any marketing agreement with the association of which such person has knowledge, shall be liable to the association aggrieved in a civil suit in the penal sum of $500.00 for each offense; and that such association shall be entitled to an injunction against such warehouseman to prevent such breach and shall be entitled to recover a reasonable attorney's fee and its costs incurred in such litigation.

Necessarily the failure of one member of a co-operative association to keep his contract with such association affects adversely his fellow members. These members necessarily resent the action of any one who attempts to induce a member to breach a contract to their detriment. Unless the law grants a remedy to prevent outsiders from inducing members to break their contracts, it is inevitable in associations composed of so many people that some will attempt to redress their own grievances and violence will follow.

That was the experience of the state of Kentucky with an earlier effort to achieve co-operation, when night-riding and violence followed the failure of some tobacco growers to keep faith with their fellow members.

With this experience in mind, the Kentucky legislature included with *Section* 27, the following declaration:

> "This section is enacted in order to prevent a recurrence or outbreak of violence and to give marketing associations an adequate remedy in the courts against those who encourage violation of co-operative contracts."

The standard co-operative marketing acts all provide, as does the Bingham Act in *Section* 28, that associations organized in accordance with such acts shall not be deemed a conspiracy nor a combination in restraint of trade nor an illegal monopoly and that the marketing contracts and agreements between the association and its members specifically authorized by the acts shall not be considered illegal nor in restraint of trade nor contrary to the provisions of the state anti-trust laws.

Section 29 of the Bingham Act provides that if any section of the Act is declared unconstitutional, the constitutionality and legality of the remainder of the Act shall not be affected thereby.

This is unquestionably a sound constitutional state-

ment, but from a practical standpoint, the operation and the economic efficiency of co-operative marketing would be seriously handicapped and impaired by a decision nullifying any of the essential sections of the Act.

The courts have had occasion to consider the entire law and have commented upon the careful manner in which the law has been drawn to restrain its results to the purposes to be accomplished. After a consideration of the law, the Supreme Court of Wisconsin said in *Northern Wisc. Co-op. Tobacco Pool* v. *Bekkedal et al.* (1923) 182 Wis. 571, 197 N. W. 936:

> "The law is rather carefully drawn, and many of its provisions may be cited, disclosing a legislative effort to restrain the results of the law to the purposes sought to be accomplished. It is not a law to be availed of by those harboring monopolistic purposes. For instance, each member has one vote, and only one vote. Proxy voting is prohibited, except that territorial delegate voting is provided for. This contemplates that the association will be made up of numerous and scattered members. The rate of dividends upon stock is limited to 8 per cent. * * * The nature of the contracts between the association and its members is clearly defined. The term of such contracts is limited to five years. The number of shares which any person may hold may be limited. * * * It is obvious that great and oppressive combinations of capital, constituting the real evil which has caused the enactment of stringent anti-trust legislation, would not find this law very helpful, and that those having monopoly as their dominant purpose would not choose to take advantage of this law."

The completeness of the plan authorized by the Act was recognized in *Tobacco Growers Co-op. Ass'n.* v. *Jones* (1923) 185 N. C. 265, 117 S. E. 174:

> "The act establishes a complete plan of organization for co-operative marketing of agricultural products under the fullest public supervision and control. Every possible safeguard against private

profit, manipulation by a few powerful members, and 'squeezing out' of the weaker members and abuse of powers are embraced in the law."

The Supreme Court of Minnesota in *Minn. Wheat Growers Co-op. Marketing Ass'n* v. *Huggins* (1925) 162 Minn. 471, 203 N. W. 420, analyzes the Standard Co-operative Marketing Act of that state, as follows:

"The association handles only the products of its own members. It does so without profit. There is no capital stock. The law authorizes the making of membership contracts and specifies remedies for breach thereof. One of the main features of this law is to minimize the expense of the middleman. It also tends to protect the farmer against alleged unscrupulous conduct of others in the market. The sole purpose of this law is, by an economical marketing of the crop owned by its members, to obtain for them a fair and reasonable price, without useless expense, and without necessarily increasing the cost to the consumer. The association advances money to the members for their immediate needs protecting them from having to sell on an unsatisfactory market. No one can join the association but a producer. He is not forced to join. He does so voluntarily. It is entirely optional with every producer. Each member has but one vote. It is an organization of farmers, and farmers are characteristically meticulous."

In the provisions of the standard co-operative marketing acts, the legislature has provided for the incorporation of a new type of corporate body for the specific needs of Agriculture and to enable such corporations to function as business institutions without capital and without profit so that their members may do collectively what no farmer can do individually in the way of financing, warehousing, processing, grading, advertising and selling his crop.

The crops which such associations are organized to market are handled by the associations under the terms

of voluntary marketing contracts which the farmers growing such crops may sign or not at their option.

The form of contract which was originally signed by some 58,000 burley tobacco growers and which has since been signed by a total of more than 112,000 of such growers, is a standard form of contract and was attached as Exhibit "A" to the petition in the present case. (R. 4-10.)

D. Outline of standard form of co-operative marketing contract.

The terms of the standard form of co-operative marketing contract signed by the members of the Burley Tobacco Growers Co-operative Association provides that the Association agrees to buy and the member agrees to sell and deliver to the Association all the tobacco produced by or for him for a period of five years. (Section 2.)

The Association agrees to grade this tobacco and to pool the tobacco of each grower with tobacco of a like type, grade and quality delivered in the same crop year by other growers. (Section 5.)

The Association then agrees to resell this tobacco together with the tobacco of like type, grade and quality delivered by other growers under similar contracts at the best prices obtainable under market conditions and to pay over the net amount received therefrom to the member, less the cost of maintaining the Association and of handling and marketing his tobacco and of creating funds for credits and reserve not to exceed one per cent of the gross resale price. (Section 6.)

Section 7 provides that while the Association may handle some tobacco in one way and some in another,

that the net proceeds of all tobacco of like type, quality and grade shall be divided rateably among the members in proportion to their deliveries to each pool and that payment shall be made from time to time as the pool is sold, until the accounts of each pool are finally settled.

There is no limitation of production and the contract specifically provides that the member may stop growing tobacco and grow anything else at any time at his free discretion (Section 11); and that nothing in the contract shall be interpreted as compelling the member to deliver any specific quantity of tobacco each year; but he is required to deliver all the tobacco produced by or for him (Section 12.)

There is adequate provision to enable the Association to borrow money upon the tobacco delivered by its members and to make advances to its members on account of the tobacco delivered by them. (Section 9.)

There is also adequate provision to enable the Association to acquire warehouses and other facilities for curing, redrying and processing tobacco and to make deductions from the amount due each member, in order to pay for such facilities; provided, however, that the grower receives an interest in such facilities corresponding to the amount deducted from his account. (Section 16.)

Other provisions grant the Association authority to establish offices, warehouses and selling agencies. (Sections 8, 10.)

The contract of the Association with each of its members is similar in its terms; and it is provided that all contracts shall constitute one single contract, (Section 15); and that all parties agree that the individual contract *"is one of a series dependent for its true value upon the adherence of each and all the growers to each and all of said contracts."* (Section 18.)

Since the essence of co-operation requires that each grower keep his contract with his fellow growers, the contract contains an agreement that the Association shall be entitled (a) to an injunction; and (b) to a decree for specific performance to prevent a breach of the contract, (Section 18b); and shall also be entitled to recover the sum of five cents a pound as liquidated damages for a breach of the contract. (Section 18a.)

In practical operation a member delivers his tobacco to his Association. The Association then weighs and grades the tobacco and delivers to the member a receipt giving the weight and the grade. The Association also makes an advance to its members at the time of delivery of a certain per cent of the estimated value of the tobacco delivered by such members.

The tobacco of the individual member is then placed in a pool with the tobacco of other members of like grade and quality. Sales of this pool are made from time to time in accordance with the best judgment of the Manager of the Association and of its officers and directors.

Tobacco that cannot be sold may be processed and stored until a market can be obtained for such tobacco.

It is sometimes necessary for co-operative associations to carry over the surplus or unsaleable part of the crop of one year until such surplus can be sold at a reasonable price; and the Association maintains proper warehouse facilities and may borrow money upon warehouse receipts in order to accomplish this.

As soon as a sufficient sum has been realized from the sale of the pooled tobacco to cover the original advance and to warrant making a further payment to the grower whose tobacco is in such pool, an additional payment is made. Such payments are made from time to time and

hen all the tobacco of the pool is sold, a final settle-ent is made with each member for his proportionate are of the net amount received from the sale of the obacco.

E. The standard form of co-operative marketing law nd co-operative marketing contract have been uniformly ustained.

The provisions of the standard co-operative market-ng acts and co-operative marketing contracts described bove have frequently been attacked upon all the rounds covered by the assignments of error in this ase. In every state where the standard contract or law as been considered by the courts, the constitutionality nd legality of such law and contract have been sus-ained.

The courts have uniformly held that the co-operative narketing law and contract do not violate the 14th Amendment to the Federal Constitution and that asso-iations organized under such laws do not violate either he State or Federal anti-trust laws.

Similar decisions have been rendered by the courts of Canada and Great Britain.

To indicate the unanimity of judicial opinion, we cite below a list of the leading cases in the various states of the Union, in which the constitutionality and legality of the Co-operative Marketing Act and Contract and of associations operating thereunder is sustained:

ALABAMA: *Ex parte Baldwin County Producers Corporation* (1919), 203 Ala. 345, 83 So. 69.

Warren v. *Alabama Farm Bureau Cotton Association* (1925), Ala., 104 So. 264.

ARKANSAS: *Arkansas Cotton Growers' Co-op. Ass'n* v. *Brown* (1925), Ark., 270 S. W. 964.

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Anaheim Citrus Fruit Ass'n v. Yeoman (1921), 51 Cal. App. 759, 197 Pac. 352.

Poultry Producers of Southern Cal. v. Barlow (1922), 189 Cal. 278, 208 Pac. 93.

Poultry Producers of Central Cal. v. Nilsson (1925), 259 Pac. 1086.

COLORADO: *Rifle Potato Growers v. Smith* (1925), Col. 240 Pac. 937.

GEORGIA: *Harrell v. Cane Growers' Co-op. Ass'n* (1925), Ga. 126 S. E. 531.

ILLINOIS: *Milk Producers Marketing Co., appellee, v. Arthur M. Bell* (1924), 234 Ill. App. 222.

INDIANA: *Burley Tobacco Society v. Gillaspy* (1912), 51 Ind. App. 583, 100 N. E. 89.

Robertson v. Dark Tobacco Growers' Co-op. Ass'n (1926), Ind. App., 150 N. E. 106 (Advance Sheet Feb. 9, 1926).

Burley Tobacco Growers' Co-op. Ass'n v. Rogers (1926), Ind. App., 150 N. E. 384 (Advance Sheet March 2, 1926).

IOWA: *Clear Lake Co-op. Live Stock Shippers' Ass'n v. Weir* (1925), Iowa, 206 N. E. 297.

KANSAS: *Kansas Wheat Growers' Ass'n v. Schulte* (1923), 115 Kan. 672, 216 Pac. 311.

Kansas Wheat Growers' Ass'n v. Charlet (1925), 118 Kan. 765, 238 Pac. 657.

KENTUCKY: *Owen County Burley Tobacco Society et al. v. Brumback et al.* (1908), 128 Ky. 137, 107 S. W. 710.

Commonwealth v. Hodges (1910), 137 Ky. 233, 125 S. W. 680.

Louisville & N. R. Co. v. *Burley Tobacco Society et al.* (1912), 147 Ky. 22, 145 S. W. 1040.

Potter v. *Dark Tobacco Growers' Co-op. Ass'n* (1923), 201 Ky. 441, 257 S. W. 33.

Liberty Warehouse Co. v. *Burley Tobacco Growers' Co-op. Ass'n* (1925), 208 Ky. 643, 271 S. W. 695.

LOUISIANA: *Louisiana Farm Bureau Cotton Growers' Co-op. Ass'n* v. *Clark* (1925), 160 La. ____, 107 So. 115 (Advance Sheet March 20, 1926).

MICHIGAN: *Hart Potato Growers' Ass'n* v. *Greiner* (decided Dec. 8, 1926) Mich. 211, N. W. 45 (Advance Sheet Jan. 7, 1927).

MINNESOTA: *Minn. Wheat Growers' Co-op. Marketing Ass'n* v. *Huggins* (1925), 162 Minn. 471, 203 N. W. 420.

MISSISSIPPI: *Brown* v. *Staple Cotton Co-op. Ass'n* (1923), 132 Miss. 859, 96 So. 849.

NEBRASKA: *Nebr. Wheat Growers' Ass'n* v. *Norquest* 1925), Nebr., 204 N. W. 798.

NEW HAMPSHIRE: *Manchester Dairy System, Inc.*, v. *Hayward* (1926), N. H., 132 Atl. 12 (Advance Sheet, March 11, 1926).

NEW YORK: *Castorland Milk & Cheese Co.* v. *Shantz* (1919), 179 N. Y. S. 131.

Bullville Milk Producers' Ass'n, Inc., v. *Armstrong* (1919), 108 Misc. Rep. 582, 178 N. Y. S. 612.

NORTH CAROLINA: *Tobacco Growers' Co-op. Ass'n* v. *Jones* (1923), 185 N. C. 265, 117 S. E. 174.

OHIO: *Last* v. *Burley Tobacco Growers' Co-op. Ass'n* (1926), 114 O. S. 361, 151 N. E. 471.

Early v. *Co-op. Pure Milk Ass'n* (decided June 8, 1926), 115 O. S. 52 (Ohio Law Rep., July 26, 1926).

OREGON: *Oregon Growers' Co-op. Ass'n* v. *Lentz* (1923), 107 Ore. 561, 212 P. 811.

Oregon Growers' Co-op. Ass'n v. *Riddle* (1926), Ore., 241 Pac. 1011. (Advance Sheet, Feb. 1, 1926).

South Carolina: *South Carolina Cotton Growers' Co-operative Ass'n* v. *English* (Supreme Court of South Carolina, May 31, 1926), 133 S. E. 542.

Tennessee: *Tennessee Cotton Growers' Ass'n* v. *C. C. Henson* (Court of Appeals of Tennessee at Jackson, Tennessee; opinion dated April, 1926.

State ex rel. Thompson v. *Burley Tobacco Growers Co-operative Ass'n*, decided May Term, 1926, by Court of Appeals of Tennessee, Eastern Section, Affirmed and Writ of Certiorari denied by Supreme Court of Tennessee Jan. 15, 1927 (not yet officially reported).

Tobacco Growers' Co-op. Ass'n et al. v. *Dunn et al.* (1924), 150 Tenn. 612, 266 S. W. 308.

Dark Tobacco Growers' Co-operative Ass'n v. *Mason* (1924), 150 Tenn. 228, 263, S. W. 60.

Texas: *Texas Farm Bureau Cotton Ass'n* v. *Stovall* 1923), 113 Tex. 273, 253 S. W. 1101.

Hollingsworth et al. v. *Texas Hay Ass'n* (1923), 246 S. W. 1068.

Texas Farm Bureau Cotton Ass'n v. *Kyle* (Court of Civil Appeals of Texas, Feb. 11, 1926), 281 S. W. 629.

Virginia: *Elmore* v. *Maryland & Virginia Milk Producers Ass'n* (Supreme Court of Appeals of Virginia, March 18, 1926), 132 S. E. 521.

Washington: *Washington Cranberry Growers Association* v. *Moore* (1921), 117 Wash. 431, 201 Pac. 773.

Pierce County Dairymen's Ass'n v. *Templin* (1923), 124 Wash. 567, 215 Pac. 352.

Wisconsin: *Northern Wis. Co-op. Tobacco Pool* v. *Bekkedal et al.* (1923) 182 Wis. 571, 197 N. W. 936.

Canada: *Saskatchewan Co-operative Wheat Producers, Ltd., Plaintiff Appellant*, v. *Leon R. Zurowski*, Law Reporter, 1926. 3 Dom. Law. Reporter 810 (Weekly Report Sept. 23, 1926).

THE QUESTION PRESENTED.

This is the first time that the question of the constitutionality of co-operative marketing in the United States has been directly presented to this court.

The co-operative marketing law and contract have been sustained by the highest courts of a majority of the states, from New Hampshire to Texas, and by every state where the question has arisen. But it is important that a decision be rendered by this court which will finally determine the right of the farmers of the United States to co-operate in the marketing of the products of their land and labor.

Broadly stated, the question presented in this case is whether the co-operative marketing of agricultural products as authorized by the existing laws of the United States and of more than three-fourths of the states, is constitutional, and whether the state has power to safeguard co-operative marketing contracts against outside attack so as to make the co-operative marketing system practical and effective.

This question arises in the present case from the admitted, deliberate and successful attempt of a loose-leaf warehouse company to induce a member of a co-operative marketing association to break his contract with that association and to sell his tobacco over the warehouse floor, contrary to the specific provisions of the Co-operative Marketing Law.

The circumstances of the present case show that the action of the warehouseman in inducing the member to break this contract was willful and malicious, in that the warehouseman knew of the existence of the member's

contract with the Association; and notwithstanding such knowledge aided and assisted the member to dispose of his tobacco contrary to his contract and to the personal profit of the warehouseman who induced the breach of contract.

The Association therefore brought this action under Section 27, which provides for the recovery of a penalty and an attorney fee against a warehouseman who knowingly induces a breach of contract and aids a member in breaking his contract by disposing of his tobacco over the warehouse floor and to the personal profit of the warehouseman.

The defense does not deny the facts but challenges the constitutionality of the Kentucky Co-operative Marketing Act under which the present action is brought, on the ground that such Act violates the Commerce Clause and the Fourteenth Amendment to the Federal Constitution and on the further ground that the defendant Association, organized in accordance with such Act, is an illegal trust and monopoly in violation of the Sherman Anti-Trust Law.

In the Kentucky courts, additional claims were made to the effect that the Kentucky Co-operative Marketing Act violated certain provisions of the Kentucky Constitution and that the defendant Association was an illegal trust and monopoly in violation of the laws of the State of Kentucky. The Court of Appeals of Kentucky overruled these claims and held that the Kentucky Co-operative Marketing Act conformed to the Constitution of the State of Kentucky and did not violate any provision thereof.

The Court of Appeals of Kentucky further held that the defendant Association was not an illegal trust or monopoly and did not restrain trade and was not organ-

ged or operated contrary to any law of the State of Kentucky concerning trusts, monopolies or restraint of trade.

The Court further held that the third paragraph of the answer in which the plaintiff in error attempted to set up a counterclaim for damages under the Sherman Anti-Trust Law was incorrectly pleaded and was properly stricken from the answer.

Any question with respect to the Kentucky Constitution and with respect to the defendant Association constituting a trust or monopoly under the laws of Kentucky and with respect to the proper pleading of the counterclaim is concluded by the decision and judgment of the Court of Appeals of Kentucky and is not subject to review in this court.

We have therefore confined our argument to the principal question presented by this record, namely: Whether the Co-operative Marketing Act of Kentucky violates the Federal Constitution.

SUMMARY OF ARGUMENT.

Page

I. THE CO-OPERATIVE MARKETING ACT OF KENTUCKY DOES NOT VIOLATE THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.... 58

A. The Co-operative Marketing Act provides for a new type of corporation to enable farmers to market their products co-operatively 59

B. The classification contained in the Act is reasonable 61

C. The provision that co-operative associations organized in accordance with law shall not be considered in restraint of trade is a proper declaration of public policy 73

D. Connolly v. Union Sewer Pipe Co. (1902) 184 U. S. 540, considered and distinguished 88

E. Connolly case, supra, uniformly held inapplicable to Co-operative Marketing cases 99

II. SECTIONS 26 AND 27 ARE REASONABLE AND NECESSARY PROVISIONS TO MAKE THE CO-OPERATIVE SYSTEM PRACTICAL AND EFFECTIVE AND TO SAFEGUARD THE MARKETING CONTRACT BETWEEN THE ASSOCIATION AND ITS MEMBERS FROM BREACH DELIBERATELY INDUCED BY THIRD PERSONS OUTSIDE THE ASSOCIATION 105

A. The marketing contract is the cornerstone of the Co-operative Marketing structure 107

B. The Legislature has a right to protect such contract against breach which threatens the marketing system 108

C. Public policy to uphold marketing contract 115

D. Penal provision necessary to protect co-operative system 118

E. Section 27 intended to stop deliberate and malicious interference with contract relations 124

F. Section 27 is a reasonable regulation of a business and an activity impressed with a public interest, to wit: (1), the warehouse business; and (2), public auctions 133

1. Leaf tobacco warehouses are subject to regulation 134

2. Public auctions are subject to public regulation 145

G. Sections 26 and 27 are a proper exercise of Police Power to prevent fraudulent and unlawful evasion or breach of contract 149

H. The penalties provided in Section 27 do not deny due process of law or the equal protection of the laws to warehousemen or auctioneers 159

I. Minnesota Wheat Growers Co-operative Marketing Association v. Radke (1925) 204, N. W. 314, considered 170

III. THE BURLEY TOBACCO GROWERS CO-OPERATIVE ASSOCIATION IS ORGANIZED IN ACCORDANCE WITH THE LAWS OF KENTUCKY AND OF THE UNITED STATES AND IS NOT ORGANIZED OR DOING BUSINESS IN VIOLATION OF STATE OR FEDERAL ANTI-TRUST LAWS 179

A. The Burley Tobacco Growers Co-operative Association is not organized or doing business in violation of the Sherman Anti-Trust Law 182

1. The Co-operative Marketing Act does not authorize evils condemned by the Sherman Anti-Trust Law 184

2. The Co-operative Marketing Act excludes associations organized thereunder from condemnation as illegal trusts or monopolies 199

3. The laws of the United States specifically authorize co-operative associations of the character of defendant in error 201

4. The appellate courts of the four states where the Burley Association is principally engaged in business (Kentucky, Ohio, Tennessee and Indiana) have specifically found that it is not organized or operating in violation of either Federal or State Anti-Trust Laws. 208

5. All courts uniformly hold that Co-operative Marketing Acts and Associations organized thereunder do not violate the Anti-Trust Laws... 225

B. The counterclaim for a declaration of rights as to the Anti-Trust Law is improper pleading 268

C. The state courts have no jurisdiction of an action for treble damages under the Sherman Anti-Trust Law 273

D. A tortious intermeddler with the contracts between defendant in error and its members cannot raise the question of their illegality 279

IV. SECTION 27 OF THE CO-OPERATIVE MARKETING ACT OF KENTUCKY IS NOT AN UNLAWFUL REGULATION OF INTERSTATE COMMERCE 281

A. Interstate commerce not involved..... 281

B. Interstate Activities of co-operative associations sanctioned by Federal law... 286

V. BRIEF OF PLAINTIFF IN ERROR CONSIDERED..... 288

CONCLUSION 293

ARGUMENT.

I.

THE CO-OPERATIVE MARKETING ACT OF KENTUCKY DOES NOT VIOLATE THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The plaintiff in error claims that the Co-operative Marketing Act of Kentucky violates the equal protection provision of the Fourteenth Amendment to the Constitution of the United States.

The Fourteenth Amendment provides in Section 1 that "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The basis for the claim that the State of Kentucky denies the equal protection of its laws to the plaintiff in error is that the Co-operative Marketing Act grants certain rights to co-operative marketing associations that are not granted to other corporations or classes within the jurisdiction of the state. The plaintiff in error complains particularly because of the provision of the Co-operative Marketing Act which exempts associations of agricultural producers organized in accordance with such Act from the so-called anti-trust laws.

The defendant in error maintains that the State of Kentucky has a right to create a new type of corporation to enable farmers to market their products co-operatively; and that laws enabling agricultural producers to

avail themselves of the corporate privileges provided by the Act constitute a reasonable classification within legislative discretion; and that the exemption of such corporations from the provisions of the laws of the state with respect to illegal trusts and monopolies is a proper declaration of public policy.

A. The Co-operative Marketing Act provides for a new type of corporation to enable farmers to market their products co-operatively.

It is indisputably within the power of the State Legislature to grant corporate charters to its citizens under terms and conditions established by State laws.

Numerous laws have been passed for the incorporation of different classes of corporations for profit and not for profit, such as general corporations, railroad companies, insurance companies, educational societies, charitable associations, etc.

It is obvious that none of these laws were sufficient to meet the peculiar needs of agricultural producers. Agriculture is characterized by individual production over a wide expanse of territory. It is impossible for an individual farmer, practically all of whose time must be devoted to production, to study market conditions or to merchandise his products in a scientific manner. It is impossible for the average farmer of small means to obtain the advantages and low interest rates obtainable by large organizations sanctioned by law. It is impossible for the individual farmer to organize warehouses, or to store, process and finance his surplus crop. It is impossible for an individual farmer to standardize the pack and grade of a crop. It is impossible for an individual farmer to increase national demand by national advertising. But above all, it is impossible for an individual farmer

to stop speculation and manipulation of markets and to stop the fluctuation of markets incident to the dumping of the entire crop of himself and his fellow producers upon the market at one time.

To do these things which the individual farmer can not do, requires the collective action of large numbers of producers. To stop dumping; to stabilize markets; to provide for the orderly marketing of the year's crop; to merchandise that crop scientifically; to eliminate the waste due to unnecessary middlemen; to adequately store, process and finance the surplus crop of any year; to standardize the grade and pack; to widen markets and increase consumption by National advertising and skillful salesmanship, necessarily requires the co-operation of thousands of individual farmers.

This co-operation can only be made effective through corporate form. In order to enable such co-operative association to function efficiently and to enable it to do business as business is conducted to-day and to insure the legality of its actions and contracts, it is essential to provide a specific type of corporate entity which meets the needs of agricultural producers and permits them to secure the advantages of the corporate form for the co-operative marketing of their products.

The necessity for this new type of corporation to permit agricultural producers to combine (without capital) for the purpose of selling their products (without profit) was clearly recognized by the Legislature and is set forth in *Section* 5 of the *Bingham Co-operative Marketing Act*, which reads in part:

> "It is here recognized that agriculture is characterized by individual production in contrast to the group or factory system that characterizes other forms of industrial production; and that the ordinary form of corporate organization permits indus-

trial groups to combine for the purpose of group production and the ensuing group marketing and that the public has an interest in permitting farmers to bring their industry to the high degree of efficiency and merchandising skill evidenced in the manufacturing industries; and that the public interest urgently needs to prevent the migration from the farm to the city in order to keep up farm production and to preserve the agricultural supply of the nation; and that the public interest demands that the farmer be encouraged to attain a superior and more direct system of marketing in the substitution of merchandising for the blind, unscientific and speculative selling of crops; and that for this purpose, the farmers should secure special guidance and instructive data from the Dean of the College of Agriculture of the University of Kentucky."

B. The Co-operative Marketing Act provides a reasonable basis of classification.

The privileges of the Co-operative Marketing Act are extended to all agricultural producers and limited to agricultural producers. The Act operates with impartial equality upon all those who fall within this classification.

Section 3 of the Act provides that 20 or more persons "engaged in the production of agricultural products, may form a non profit, co-operative association, with or without capital stock under the provisions of this Act."

Section 4 limits the purposes of the Association to activities in connection with the selling, storing or other handling of the "agricultural products of its members."

Section 6a grants the Association power to engage in various activities in connection with the selling and handling of "any agricultural products produced or delivered to it by its members" but specifically provides that "No association, however, shall handle the agricultural products of any non-member except for storage."

Section 7 authorizes the Association to admit as mem bers or issue common stock to "persons only engaged i the production of the agricultural products to be han dled by or through the Association" including lessee and tenants and lessors who receive part of the crop a rent.

In view of the decisions of this court sustaining much narrower classifications than the classification contained in the Co-operative Marketing Act, there can be little question as to the reasonableness of such classification or the right of the Legislature to authorize the incorpo ration of agricultural producers as co-operative bodies and to extend to such bodies definite powers.

An excellent statement of the rules to test legislative classification is contained in *Lindsley* v. *Natural Carbonic Gas Co.* (1911) 220 U. S. 61; 55 L. ed. 369, in which a statute was alleged to be arbitrary in its classification because it was directed against pumping from wells bored or drilled into rock but not against pumping from wells not penetrating the rock. In upholding the statute, Mr. Justice Van Devanter said, at page 78:

> "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety, or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classifica-

tion in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary. *Bachtel* v. *Wilson*, 204 U. S. 36, 41; 51 L. ed. 357, 359; 27 Sup. Ct. Rep. 243; *Louisville & N. R. Co.* v. *Melton*, 218 U. S. 36; 54 L. ed. 921; 30 Sup. Ct. Rep. 676; *Ozan Lumber Co.* v. *Union County Nat. Bank*, 207 U. S. 251, 256; 52 L. ed. 195, 197; 28 Sup. Ct. Rep. 89; *Munn* v. *Illinois*, 94 U. S. 113, 132; 24 L. ed. 77, 86; *Henderson Bridge Co.* v. *Henderson*, 173 U. S. 592, 615; 43 L. ed. 823, 831, 19 Sup. Ct. Rep. 553."

Illustrations of the power of the Legislature to enact valid legislation applying to particular classes abound in the decisions of this court. Some of these cases are:

Mutual Loan Co. v. *Martell* (1911) 222 U. S. 225, 56 L. ed. 175. Sustains placing loan companies in a separate class from other credit organizations.

Clark v. *Kansas City* (1900) 176 U. S. 114, 44 L. ed. 392. Classification distinguishing agricultural from other lands is valid.

Cargill v. *Minn.* (1901) 180 U. S. 452; 45 L. ed. 619. Upholds legislation classifying warehouses located upon a railroad differently from those not so located.

St. John v. *N. Y.* (1906) 201 U. S. 633; 50 L. ed. 896. Classification distinguishing producer from non-producer vendors of milk is proper.

Watson v. *Md.* (1910) 218 U. S. 173, 54 L. ed. 987. Physicians may be classified by date of beginning practice.

Hunter v. *Mutual Reserve Ins. Co.* (1910) 218 U. S. 573, 54 L. ed. 1155. Banks may be classified as distinct from other money lenders by a usury statute.

German Alliance Ins. Co. v. *Hale* (1911) 233 U. S. 307, 55 L. ed. 229. Insurance companies connected with a

tariff association may be classified distinct from other insurance companies.

Armour & Co. v. *North Dakota* (1916) 240 U. S. 510, 60 L. ed. 771. Law requiring lard to be sold in one, three or five-pound cartons when sold in packages is not invalid classification.

Omechevarria v. *Idaho* (1918) 246 U. S. 343; 62 L. ed. 763. Law classifying rights of sheep owners differently from cattle owners is valid.

Armour v. *Va.* (1918) 246 U. S. 1; 62 L. ed. 547. Manufacturers may be legally classified by whether they pay a tax on capital to the state.

Heisler v. *Colliery Co.* (1922) 260 U. S. 245; 67 L. ed. 237. Statute taxing anthracite and not bituminous coal is valid classification.

Crescent Cotton Oil Co. v. *Miss.* (1921) 257 U. S. 129; 66 L. ed. 166. A distinction between corporations and individuals operating cotton gins and oil mills is valid.

Richard M. Jones v. *Union Guano Co.* (1924) 264 U. S. 171; 68 L. ed. 623. Holds law classifying action for damage to crops by improper fertilizer differently from other damage suits is valid.

Packard v. *Banton* (1924) 264 U. S. 140; 68 L. ed. 596. A classification of motor cars for hire and excluding street cars and omnibuses is proper.

Payne v. *State of Kansas* (1918) 248 U. S. 112; 63 L. ed. 153. Upholds a Kansas Act forbidding the sale of farm produce on commission without an annual license.

Merchants Exchange of St. Louis v. *Missouri ex rel. Barker* (1919) 248 U. S. 365; 63 L. ed. 300. Sustains a Missouri statute prohibiting the issue by any person other than a state weigher of weight certificates for grain weighed at such warehouses.

Dillingham v. *McLaughlin* (1924) 264 U. S. 370; 68 L. ed. 742. Sustains a statute forbidding individuals, partnerships or unincorporated associations to engage in the business of receiving money deposits for co-operative or mutual savings under $500.00 and making a distinction between deposits above and below this sum.

Missouri, Kansas & Texas Railway Co. of Texas v. *May* (1904) 194 U. S. 267; 48 L. ed. 971. Holds that a penalty imposed on a railway company for allowing Johnson Grass or Russian Thistle to go to seed is valid regulation for the protection of farming.

International Harvester Co. v. *Missouri*, 234 U. S. 199, 34 S. Ct. 859, 58 L. ed. 1276, 52 L. R. A. (N. S.) 525, is an important case holding that an Anti-Trust Law which confined its prohibitions to manufacturers and vendors while permitting combinations among purchasers does not violate the 14th Amendment or deny the equal protection of the Laws. At page 215 the *Connolly Case*, 184 U. S. 540, is held inapplicable.

In *Jewel Tobacco Warehouse Co. et al.* v. *Kemper* (1925) 206 Ky. 667; 268 S. W. 324, the Kentucky Court of Appeals collects the decisions of that state upholding classifications similar to those made by the Co-operative Marketing Act. The Court said:

> "Classification or division of businesses, occupations and callings into particular classes may be made according to natural, reasonable and well-recognized lines of distinction. This rule is well established in this jurisdiction."

Citing:

Metropolitan Life Insurance Co. v. *City of Paris*, 138 Ky. 801; 129 S. W. 112; *Hager* v. *Walker*, 128 Ky. 1, 107 S. W. 254, 32 Ky. Law Rep. 748, 15 L. R. A. (N. S.) 195, 129 Am. St. Rep. 238; *Brown-Forceman Co.* v. *Commonwealth*, 125 Ky. 402, 101 S. W. 321, 30 Ky. Law Rep. 793;

Louisville v. *Schnell*, 131 Ky. 104, 114 S. W. 742, 40 L. R. A. (N. S.) 637; *Carlisle* v. *Heckinger*, 103 Ky. 381, 45 S. W. 358, 20 Ky. Law Rep. 74; *City of Louisville* v. *Sagalowski & Son*, 136 Ky. 324, 124 S. W. 339, 136 Am. St. Rep. 258.

This court, in a series of decisions, has definitely approved classifications of farmers and agricultural producers as reasonable and natural.

In *American Sugar Refining Co.* v. *Louisiana* 179 U. S. 89, this court sustained a statute requiring the payment of a license tax by refiners of sugar, and exempting planters and farmers grinding and refining their own sugar. The Act was attacked as violative of the 14th Amendment. The court held at page 95:

> "The discrimination is obviously intended as an encouragement to agriculture and does not deny to persons and corporations engaged in a general refining business the equal protection of the law."

A like classification of farmers was upheld in *German Alliance Insurance Co.* v. *Lewis* 233 U. S. 389, 418. It was there decided that the Insurance Law of the state of Kansas exempting Farmers Mutual Insurance Companies which insured farm property from the burdens of the law, while imposing them upon other insurance companies, did not violate the 14th Amendment. The court held that there were certain differences between the two classes of corporations, and recognition of these differences was not beyond the power of the Legislature.

In *New York Central Railroad Co.* v. *White* 243 U. S. 188; and *Ward* v. *Krinsky* (1922) 259 U. S. 503; 66 L. ed. 1033, an exemption of farmers from the operation of Workmen's Compensation Acts was held constitutional. In the latter case, *Ward* v. *Krinsky*, the court sustained the New York Workmen's Compensation Law which ap-

plied to all employment in which four or more workmen were regularly engaged "*except farm laborers and domestic servants*" and held that such exemptions did not offend against the due process of law or equal protection clauses of the 14th Amendment. The court said that the groupings made by the Workmen's Compensation Law should not be overthrown unless the same could not be explained on any reasonable ground and that it must be assumed that after years of practical experience and extensive study the Legislature was satisfied that the law suited the needs of the people. At page 522, the court said:

> "It was desired to leave out as before farm laborers and domestic servants,—a *classification sustained upon simple grounds*, doubtless far from expressing in full the reasons that had actuated the Legislature, in *New York C. R. Co.* v. *White* 243 U. S. 188, 208."

In *Miller* v. *Wilson* (1915) 236 U. S. 373; 59 L. ed. 628, the exemption of the fruit harvesting and canning industries from the Women's Eight Hour Law of California was held constitutional.

In *Smith* v. *Kansas City Trust Co.* 255 U. S. 180, there was involved the constitutionality of the Federal Farm Loan Act (39 Stat. 360; amended 40 Stat. 341.) This Statute provided for loans to farmers to be made by Federal Land Banks and to be secured by mortgages upon farm lands. The banks were to deposit the notes and mortgages with the Farm Loan Registrar and to issue collateral trust obligations, called farm loan bonds, which were to be secured by an equivalent amount of farm mortgages and notes. These farm loan bonds were exempted from taxation of all kinds. The loans on farm mortgages were to be made to co-operative borrowers, through the organization of corporations, known

as National Farm Loan Associations, by persons desiring to borrow money upon the security of farm mortgages.

Without going into the terms of the statutes in detail, it is clear that the benefits of the act were limited to farmers. Loans could not be made upon any property other than farm land. Bonds issued upon the security of farm mortgages were exempted from National, State and local taxation, while other bonds or mortgages, except municipal obligations, were taxed.

This classification of farmers as a distinct group was sustained and Mr. Justice Day said at page 210, 211:

> "But whether technically banks or not, these organizations may serve the *Governmental purposes* declared by Congress in their creation." (Italics ours).

In *National Union Fire Insurance Co.* v. *Wanberg* (1922) 260 U. S. 71; 67 L. ed. 136, the court upheld a North Dakota statute which provided that every insurance company engaged in the hail insurance business should be bound, and the insurance should take effect twenty-four hours from the day and hour that the application for insurance was taken by the local agent of the company. If the company desired to decline the risk, it was required to notify the applicant and agent by telegram upon receipt of the application. On July 12, 1917, Wanberg delivered his application to an agent who had no authority to write policies. The company received the application on July 16th. On the 17th it refused the application and returned the premium. Without the knowledge of the Company, Wanberg's crops were destroyed by hail on July 14th. He sued the Company and relied upon the Statute. The Company contended that it was deprived of its liberty to contract and that the 14th Amendment was violated.

Although the statute in that case imposed the obliga-
ons of the contract upon a party who did not desire
enter into the same, the court sustained the statute
the ground that it was enacted to promote the pub-
interest and was a proper regulation of a business
pressed with a public interest for the benefit of agri-
lture. The Chief Justice said at page 74:

"The statute treats the business of hail insurance as effected with a public interest. In that country, where a farmer's whole crop—the work and product of a year—may be wiped out in a few minutes, and where the recurrence of such manifestations of nature is not infrequent, and no care can provide against their destructive character, it is of much public moment that agencies like insurance companies, to distribute the loss over the entire community should be regulated so as to be effective for the purpose. * * * There is no discrimination and no denial of the equal protection of the laws. * * * The legislature was evidently convinced that it would help the public interest if farmers could be induced generally to take out hail insurance, and 'temper the wind' so injurious to the agriculture of the state; and that they would be more likely to avail themselves of this protection if they could effect this insurance promptly on the eve of the danger."

The courts have specifically upheld the classification
ained in the Standard Co-operative Marketing Acts.

In *Harrell* v. *Cane Growers Co-op. Ass'n* (1925) Ga.
5 S. E. 531, the Chief Justice of the Supreme Court
Georgia said:

"The necessities of a great public interest may authorize a reasonable classification of citizens, as between diverse interests or occupations. It is within the power of the Legislature to consider and act upon existing or varying conditions as affecting the public welfare in conformity with those economical conditions; and existing economical conditions may of themselves justify or compel legislation classify-

> ing farmers as a class requiring beneficial legisla
> tion. The classification of farmers as a producin
> class, whose labors are individualistic and not b
> the group, as in many other forms of labor, is
> reasonable, just, and proper exercise of the powe
> of classification."

In a recent decision by the Supreme Court of Iowa the Standard Co-operative Marketing Act of that state is sustained. With specific reference to the classification of agricultural producers made by the Act, the court said in *Clear Lake Co-op. Live Stock Shippers Ass'n* v. *Wes* (1925) Iowa, 206 N. W. 297:

> "Agriculture, of which stock raising is a part, is a basic industry in this state, as well as in a large part of the nation, north and south. A much larger proportion of the people of this state are engaged in agriculture than in any other industry or business. There is no industry to be found anywhere in which classifications based thereon are more natural, obvious, and exclusive than agriculture. It is as distinct in its character as mining, manufacturing, banking, or any other branch or division into which society is economically divided. The act in question makes no discrimination between the individuals of this class. Any five persons engaged in agriculture may organize a co-operative nonprofit-sharing corporation under the provisions thereof for the purpose of marketing the products of its members. No one engaged in agriculture is excluded from its benefits, and all may become members of associations organized under the act. Appellee is not a purchasing agency, and its functions are limited to the selling of certain of the farm products of its members on foreign markets. The statute denies to no one engaged in agricultural pursuits any right or privilege conferred upon others similarly situated and engaged. There is, therefore, no discrimination or curtailment of the rights of a single member of the class for the benefit of which it was enacted. Many states have adopted similar enactments, and, so far as they have been passed upon by the courts thereof, they have been uni-

formly sustained. In numerous of the above cited cases provisions almost identical with section 11 have been sustained."

In *Rifle Potato Growers* v. *Smith* (1925) Colo., 240 Pac. 937, the Supreme Court of Colorado sustained the recent Standard Co-operative Marketing Act of that state. Concerning the claim that the Act was unconstitutional because it was class legislation, the court said:

"It is claimed that the act of 1923 is unconstitutional because it is 'class legislation.' The term 'class legislation' is too indefinite for consideration. What is meant is that the act is in violation of article 5, § 25, of the Colorado Constitution, because it gives to agriculturists what is denied to other citizens—the right to make a contract for co-operative marketing. * * *

"It is conceded that the Legislature may reasonably classify, and it is held that 'a law is not local or special when it is general and uniform in its operation upon all in like situation.' *People* v. *Earl*, 42 Colo. 238, 264 and 265, 94 P. 294, 302. There must be some distinguishing peculiarity which makes reasonable the exception of the designated class from the general law. The reason for such exception existing, the classification adopted is a matter to be determined by the Legislature. Id. This law is general and uniform upon all in like situation. The question, then, for us to determine is whether there was a reason for the exception of the designated class. We think that, unless the classification clearly appears to be unreasonable, we must yield to the judgment of the Legislature upon that point, and we think it not clearly unreasonable to say that there are reasons for maintaining stability of the markets of agricultural products beyond like reasons in case of other products, and that we must, therefore, acquiesce in this classification. The Legislature in such classifications must have a wide range of discretion. *Owen County, etc. Assn.* v. *Brumback*, 128 Ky. 152, 107 S. W. 710. It follows that we cannot say that the act in question is a violation of article 5, § 25. This reasoning, substantially as we have stated it, has been followed in

other jurisdictions. *Farrell* v. *Port*, 50 Or. 169, 91 P. 548, 93 P. 254; *Owen County, etc., Ass'n* v. *Brumback, supra; Oregon Growers* v. *Lentz*, 107 Or. 561, 212 P. 811."

In *Owen County Burley Tobacco Society et al.* v. *Brumback et al.* (1908) 128 Ky. 137, 107 S. W. 710, the Court of Appeals of Kentucky said with reference to a prior Co-operative Marketing Act:

> "Treating the act solely as a selection of a class of persons upon whom specified privileges are conferred, it is not in contravention of the fourteenth amendment to the Constitution of the United States, • • • This section has been frequently considered by the Supreme Court of the United States, and it has been ruled that it does not deny the state the right to classify and select occupations, trades, and professions."

In *Potter* v. *Dark Tobacco Growers Co-op. Ass'n* (1923), 201 Ky. 441, 257 S. W. 33, the Court of Appeals of Kentucky in sustaining the Bingham Co-operative Marketing Act involved here, said upon the question of classification:

> "The best evidence of the sure foundation of the federal Constitution is not that it was declaratory of the highest conceptions of truth and justice with reference to community life when it was written, but that, correctly interpreted, it is equally so to-day, despite the many changes time and experience have brought in such conceptions. The Constitution in the Fourteenth Amendment declared the public policy of equal protection of the laws, unalterably, both then and now, it is true, except by formal amendment, but being written for time rather than a day, most wisely left it to the Legislatures and the courts to provide the means and define the terms in accordance with an enlightened public consciousness which continually strives toward, and constantly attains, if but slowly and haltingly, a better understanding of community life. Unquestionably, as that complex problem is understood by the best thought of to-day, the Bingham Act, by enabling

the farmers to market their crops co-operatively for the purpose, as declared in the act, of regulating distribution and stabilizing the prices of farm products, serves a pressing public need that justifies the classification of farmers as a distinct class, and treats all of the class equally and fairly, and not better, if that were important, than other distinct productive classes are treated under the laws of the state and nation. It does not, therefore, offend the equal protection provisions of the federal Constitution, notwithstanding the fact that 21 years ago the Supreme Court of the United States, in the case of *Connolly v. Union Sewer Pipe Co., supra*, indicated a somewhat contrary view, but which is, under the more recent decisions of that court, easily distinguished upon several grounds."

C. Section 28 providing that co-operative associations organized in accordance with the law shall not be considered in restraint of trade or contrary to the laws against pooling or combinations, is a proper declaration of public policy.

The Legislature recognized that the right granted to members of co-operative marketing associations to pool their products in order to secure the advantages of co-operative selling, might be construed to conflict with prior enactments against pooling and combinations contained in the so-called anti-trust laws of the several states.

It is clear that the laws against trusts and monopolies were intended to cover an entirely different type of combination. Such laws were adopted to prevent the formation of combinations to crush competition and to control and enhance prices to the injury of the public.

Since co-operative associations are not within the evil aimed at by the anti-trust laws, the Legislature specifically provided that such associations should not be

considered in restraint of trade or in violation of the anti-trust laws.

This provision is Section 28 of the Bingham Co-operative Marketing Act and reads as follows:

> "Any association organized hereunder shall be deemed not to be a conspiracy nor a combination in restraint of trade nor an illegal monopoly; nor an attempt to lessen competition or to fix prices arbitrarily, or to create a combination or pool in violation of any law of this state; and the marketing contracts and agreements between the association and its members and any agreements authorized in this act shall be considered not to be illegal nor in restraint of trade nor contrary to the provisions of any statute enacted against pooling or combinations."

The Congress of the United States enacted a similar law known as the Clayton Amendment to the Sherman Anti-Trust Law, which reads as follows:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws. (Oct. 15, 1914, c. 323, § 6, 38 Stat. 731.)" Sec. 8835f, U. S. Comp Stat. 1918.

It should be noted that the defendant in error comes clearly within the above provisions of the Clayton Act. It is (1), an agricultural organization; (2), instituted for the purposes of mutual help; (3), does not have capital stock; and (4) is not conducted for profit.

In addition to the Clayton Act, Congress adopted the

Capper-Volstead Act of February 18, 1922, specifically authorizing co-operative marketing associations of the character of defendant in error to engage in interstate and foreign commerce and providing for the regulation of the activities of such associations by the Secretary of Agriculture so as to prevent any possibility of an undue enhancement of prices. The Capper-Volstead Act, to which we shall again refer in another portion of this brief, reads in part as follows:

> "Persons engaged in the production of agricultural products as farmers, planters, ranchmen, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes: Provided, however, That such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:
>
> "First, That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or,
>
> "Second, That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.
>
> "And in any case to the following:
>
> "Third. That the association shall not deal in the products of nonmembers to an amount greater in value than such as are handled by it for members. (Feb. 18, 1922, c. 57, § 1, 42 Stat. 388.)" (§ 8716½ U. S. Comp. Stat. 1925 Sup.)

Within the last six months Congress has again enacted laws expressing the public policy of the Nation to sanction and to encourage the formation and development of co-operative marketing associations of the type of de-

fendant in error. The Co-operative Marketing A
adopted July 2, 1926, is entitled "An act to create
division of co-operative marketing in the Department
Agriculture; to provide for the acquisition and dissem
nation of information pertaining to co-operation; to pr
vide for calling advisers to counsel with the Secretary
Agriculture on co-operative activities; to authorize c
operative associations to acquire, interpret, and dissem
nate crop and market information, and for other pu
poses."

Section 2 of said *Act* provides:

> "The Secretary of Agriculture is hereby autho
> ized and directed to establish a division of co-ope
> ative marketing with suitable personnel in the B
> reau of Agricultural Economics of the Departme
> of Agriculture or in such bureau in the Departme
> of Agriculture as may hereafter be concerned wi
> the marketing and distribution of farm product
> Such division shall be under the direction and supe
> vision of the Secretary of Agriculture."

Section 3 of said Act provides, in part, as follows:

> "The division shall render service to associations
> of producers of agricultural products, and federa
> tions and subsidiaries thereof, engaged in the co
> operative marketing of agricultural products, includ
> ing processing, warehousing, manufacturing, stor
> age, the co-operative purchasing of farm supplies
> credit, financing, insurance, and other co-operative
> activities."

The division is further authorized to:

1. Furnish information regarding the economic and
business methods of co-operative associations in the
United States and foreign countries;

2. To conduct studies of co-operation including analy
sis of the organization, operation, financial and merchan
dising problems of co-operative associations;

3. To assist co-operative associations in developing methods of business and marketing analyses;

4. To confer with and assist committees or groups of producers in forming co-operative associations by making economic surveys and analyses of the facts surrounding the production and marketing of the agricultural products which the association would handle;

5. To employ qualified "commodity marketing specialists" to summarize and disseminate information concerning crops, supply, demand, exports, imports and prices among co-operative associations;

6. To promote the knowledge of co-operative principles and practices;

7. To acquire and disseminate such information as may be useful in the development and practice of co-operation.

Section 5 of the Act provides that persons acting together in associations corporate or otherwise and in collectively handling agricultural products may acquire, exchange and disseminate information concerning crops, markets, etc. "by direct exchange between such persons and/or such associations or federations thereof, and/or by and through a common agent created or selected by them."

In order to enable the Government of the United States to give the maximum of assistance to the development of co-operative associations, *Section* 6 authorizes the Secretary of Agriculture to call upon "any other Federal department, board or commission to assist in carrying out the purposes of this Act." The section also appropriates $225,000 for the fiscal years 1926 and 1927 for the purposes of establishing the Division of Co-operative Marketing in the Department of Agriculture and of assisting the work of co-operative associations.

Additional Federal recognition of a National publi policy to encourage co-operative marketing association is to be found in acts enabling the War Finance Corpo ration to make advances "to any co-operative associa tion of producers in the United States which may hav made advances for agricultural purposes," (April 5 1918, C. 45, Sec. 4, added, Aug. 24, 1921, C. 80, Sec. 3, 4 Stat. 182; Sec. 3115-4/5k (4) U. S. Comp. Stat. Compact Edition, 1925 Supp.; and exempting such associations from the payment of income taxes (Par. 11, C. 234, Sec 231, 43 Stat. 282, June 2, 1924; U. S. Comp. Stat. 1925; 6336 1/6 n n.) and granting such associations the privilege of membership in grain exchanges, etc. (par. (e), c. 369, Sec. 5, 42 Stat. 1000, Sept. 1, 1922, U. S. Comp. Stat. 1925, Sec. 8747 4/5d.).

An examination of the provisions of the Federal law and of Section 28 of the Bingham Co-operative Marketing law and similar sections of the laws of a majority of the states of the Union shows a uniform public policy to exempt co-operative marketing associations organized in accordance with the provisions of law from the National and State anti-trust laws.

The plaintiff in error complains that such exemption is a denial of the equal protection of the laws. Our answer is that the anti-trust laws are an expression of public policy adopted by the Legislature and by Congress under the police power of the state and Nation.

The same power which enabled Congress and state legislatures to declare public policy with respect to trusts and combinations enables Congress and the Legislature to change such laws whenever in its judgment public policy requires such change. This power is limited only by the requirement that the law operate equally upon all within its scope and that any classification made by the law shall be reasonable and not arbitrary.

There is no constitutional provision with respect to the anti-trust laws. In the State of Kentucky there is no statutory law with respect to trusts and combinations. Restraints of trade are regulated in Kentucky exclusively by the common law. The common law condemns unreasonable restraints of trade on the ground that the same are contrary to public policy. It is clear that the Legislature is the supreme judge of public policy. When the Legislature has determined the public policy of the state with respect to a particular type of combination or a particular form of contract and has declared that such combination and contract shall not be considered in restraint of trade, its action in so doing is not subject to review by the courts.

The fact that public policy has undergone a change since the enactment of the original Sherman Anti-Trust Law and the anti-trust laws of the several states has been recognized by the courts in numerous cases and has been recognized at common law without regard to statute.

However, this change in public policy is confirmed by the *"Clayton Act,"* the *"Capper-Volstead Act,"* the 1926 *"Co-operative Marketing Act"* and *"Section* 28" of the *Standard Co-operative Marketing Acts.* In this connection the Court of Appeals of Kentucky said, in the present case, after referring to the decision in the *Potter* case:

> "We may add to what was said in that opinion that there is no statute at present in this state, nor was there any when the cause of action herein arose, against pools, trusts, and monopolies, and by the Clayton Amendment to the Sherman Anti-Trust Act (38 Stat. 730) agricultural products were expressly excluded from that act; which left, as the only law against such combinations, the common law, provided it prevailed in this state as to agricultural products after the enactment of the Bingham Act. It is, however, conceded that it is competent for a

Legislature to repeal the common law prevailing in the jurisdiction where it sits, the same as it may repeal a prior statutory enactment, and section 2 of the Bingham Act expressly provides that the organization of the co-operative marketing companies provided for by it shall not be deemed 'to be a conspiracy nor a combination in restraint of trade nor an illegal monopoly; nor an attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this state.' It is then provided in the same section that—

"'The marketing contracts and agreements between the association and its members and any agreements authorized in this act shall be considered not to be illegal nor in restraint of trade,' etc.

"It would therefore seem that section 28 of the act expressly repealed any rule of the common law that might prevail in this state militating against the legality of such contracts. However, if it should be contended that such a provision was itself unconstitutional, it could only be so held upon the ground that it was an unwarranted classification which the Potter opinion, and many others we might cite, held was untrue.

"But back of all that, we think it would not be amiss to say that neither the police power of a Legislature nor the common law is unalterable and forever fixed, regardless of changes in prevailing conditions. Each of them were intended to improve human conditions and to provide a method for the betterment of society under present prevailing and developed conditions. As they change, it is competent to change the common law, or to enlarge, modify, or qualify the police power to fit the changed conditions."

In *Potter* v. *Dark Tobacco Growers Co-op. Ass'n* (1923), 201 Ky. 441, 257 S. W. 33, the court said, concerning the Clayton Amendment of the Sherman Act:

"Hence the Sherman Act as amended is itself expressive of a change in the public attitude and policy toward agricultural and horticultural pursuits in relation to other business activities, and a recognition of a necessity for the public welfare of per-

mitting organization among such citizens to enable them to meet justly and without undue advantage the conditions they encounter in necessary trade relations with other citizens, or rather groups.

"Nor are the Clayton Act and the many other recent acts of Congress treating farmers as a distinct class the only expressions of such a change in public opinion and the public policy of our nation with reference to them and their economic problems. The enactment by the Legislature of 30 or more of the states of enabling acts precisely like the Bingham Co-operative Marketing Act is further evidence of the present state of public opinion on the matter, as is the attitude of every other agency through which an enlightened public policy may be declared, including the most recent resumé of the state of the Union by the President of the United States.

"The basis of this change in public opinion toward combination and classification is not in any sense political, but economic rather, and, in our judgment, it is because of basic economic conditions, affecting vitally not only the farmers, but also the public weal, that the classification based upon agricultural pursuits is reasonable, just, and imperative for the good of the entire nation and every citizen thereof. If this be true, the Bingham Act is based upon a classification that is not offensive to the equal protection provisions of the Fourteenth Amendment." (Citing cases.)

The court, after referring to the uneconomic spread between producer and consumer resulting from the dumping of products by farmers with the inevitable demoralization of basic economic conditions, to the hurt directly or indirectly of every citizen, continues:

"With a clear recognition of this fact borne in upon the public conscience by the threatened economic collapse of the farming industry indispensable to public welfare and national stability, if not national existence, an enlightened public opinion unmistakenly demands that farmers be permitted to organize for the marketing of their crops, not merely for their own protection, but for the public good. But what has current public opinion with

reference to economic questions to do with constitutional inhibitions and guaranties? Just this: It often, as here, affords the proper and usual approach for a consideration of their terms and meaning.

"That all law, even constitutional law, is not static, but progressive, and in step always with sound economic conditions and an enlightened public policy, recently has come to be realized clearly, if ever it may have been thought otherwise, as is attested by highest judicial and lay utterances."

In *Rifle Potato Growers* v. *Smith* (1925) Col. 240 Pac. 937, the court said:

"It hardly needs to be said that the act is not unconstitutional because it changes the rule of public policy. That would be to set public policy upon the throne of the Constitution, and, though it is urged with great seriousness and earnestness that the provision for an injunction is unconstitutional, or, at least, unenforceable, because it permits an injunction where there is no equity, yet that argument, upon examination, has no more force in it than the one concerning public policy, because the Legislature has as complete power over the rules of equity as it has over those of law."

In *Harrell* v. *Cane Growers Co-op. Ass'n* (1925) Ga. 126 S. E. 531, the Supreme Court of Georgia said:

"It is within the power of the General Assembly to consider and act upon varying conditions as affecting public welfare in conformity with changing economic conditions; and existing conditions may, of themselves, justify or compel legislation classifying farmers as a class requiring beneficial legislation. The New York Court of Appeals, in *People* v. *La Fetra*, 230 N. Y. 429, 130 N. E. 601, 16 A. L. R. 152, clearly states the principle:

"'Novelty is no argument against constitutionality. Changing economic conditions, temporary or permanent, may make necessary or beneficial the right of public regulation. * * * The question comes back to what the state may do for the benefit of the community at large. Here the legislation rests on a secure foundation. * * * The strug-

gle to meet changing conditions through new legislation constantly goes on.'

"As said by President Harding at the Agricultural Conference January 23, 1922:

"'From the very nature of things farmers cannot produce in groups. Their occupation is essentially personal and individualistic. A great manufacturing industry can consolidate under the ownership of a single corporation, with a multitude of stockholders, a great number of originally separate establishments, and thus effect economies and concentrations and acquire for itself a power in the markets where it must buy, and in the markets where it must sell, such as have not been available to agriculture. The farmer is the most individualistic and independent citizen among us. He comes nearer to being self-sufficient, but precisely because of this he has not means of co-operation, co-ordination, and consolidation which serve so usefully in other industries. A score or more manufacturers consolidate their interests under a corporate organization and attain a great increase of their power in the markets, whether they are buying or selling. The farmer, from the very mode of his life, has been estopped from these combinations; therefore, because he buys and sells as an individual, it is his fate to buy in the dearest, and sell in the cheapest, market. * * * Take co-operative marketing. American farmers are asking for, and it should be possible to afford them, ample provision of law under which they may carry on in co-operative fashion those business operations which lend themselves to that method, and which, thus handled, would bring advantages to both the farmer and his consuming public.'"

In *List* v. *Burley Tobacco Growers Co-op. Ass'n* (1926) 114 O. S. 361, 151 N. E. 471, the Supreme Court of Ohio said, concerning the change in public policy:

> "Other cases of the United States Supreme Court and courts of last resort of the states of the Union where anti-trust laws prevail might be cited in large numbers showing that the trend, if not the universal pronouncement, is toward liberality and greater tolerance of co-operation in commerce and industry.

The administrative forces of the federal governmen
are more kindly disposed toward combinations tha
ever before, and are even encouraging combination
whose tendencies do not appear to be detrimental t
the public welfare. The established interpretatio
of modern anti-trust legislation is that such laws ar
declaratory of the common law, and are enacted t
provide the machinery for preventing the abuses o
combination and co-operation and for penalizin
and punishing those transactions which by the se
tled principles of the common law are declared t
be unlawful. The transactions which are forbidde
include agreements to restrict production for th
sole purpose of enhancing price, stifling competi
tion, or creating a 'corner,' fixing prices at a definit
standard, or combining in a manner that has a ne
essary tendency to oppress competitors or the pub
lic. On the other hand, it is recognized that com
petition may be reasonable or unreasonable. It ma
be reasonable or unreasonable. It may promot
sound and sane relations between supply and de
mand, or it may ruinously place producers at th
mercy of consumers and middlemen. Combination
formed to prevent disastrous competition have neve
been condemned unless unlawful means were em
ployed."

And concluding the opinion of the court, Chief Justic
Marshall well said:

"In the last analysis this controversy turns upo
a question of public policy. The earlier anti-trus
legislation is being modified and certain well-define
exemptions are being created. The earlier decision
of the courts construing those acts strictly are bein
modified and overturned by later decisions. Sectio
6 of the Clayton Act, hereinbefore referred to, is
clear indication of a different policy on the part o
Congress, and the Capper-Volstead Act of Febru
ary 18, 1922 (sections 8716j, 8716ja, U. S. Comp
St. Supp. 1925; section 825ba and 825bb, Barne
Fed. Code), still further confirms the Congressiona
trend. Still other legislation is now pending befor
Congress, which has passed the lower house of Con
gress by an almost unanimous vote, which still fur
ther extends the principle of permitting co-opera

tion in agricultural marketing. (The reference is to the Co-operative Marketing Act of July 2, 1926, above referred to.) Co-operative marketing acts have been passed by more than three-fourths of the states of the Union. These enactments have been upheld by the courts of last resort of 15 states of the Union, and, up to this time, in not a single case have any of such state laws been declared invalid. A partial list of the cases which have been so decided is as follows:" (citing cases).

"The public policy thus declared by legislation and thus universally upheld by judicial pronouncement must be held to be sound and not in contravention of any constitutional limitations, and the contract in controversy in this case must be held to be a valid and enforceable contract. The judgments of the lower courts must therefore be affirmed." (Parentheses ours.)

In *Clear Lake Co-op. Live Stock Shippers Ass'n* v. *Weir* (1925) Iowa, 206 N. W. 297, the Supreme Court of Iowa said:

"It is a well established rule of statutory construction that the last enactment of the Legislature upon a given subject must prevail, and a former enactment to which it is repugnant will be deemed to have been repealed by implication." (Citing cases.)

"The right of the Legislature to enact legislation for the incorporation of non-profit-sharing co-operative associations is not questioned. Perhaps the Legislature, taking cognizance of altered conditions in farming and other industries, believed a change of public policy should be adopted."

In *Northern Wis. Co-op. Tobacco Pool* v. *Bekkedal et al.* (1923) 182 Wis. 571, 197 N. W. 936, the Supreme Court of Wisconsin said:

"This legislation, being enacted subsequent to the enactment of our general anti-trust statutes, must be considered as modifying the scope of the former, and the validity of plaintiff's contracts, or the effect of their operation so far as they constitute a restraint of trade, is not to be tested by the provisions of section 1747e, or court decisions con-

demning contracts under similar legislative provisions. This legislation providing for the organization of co-operative associations manifests a clear purpose on the part of the Legislature, not only to authorize, but to encourage, co-operative effort along the lines to which the legislation is made applicable, and to legalize practices which no doubt were of questionable validity prior to the enactment of such legislation.

"The reasons for promoting such legislation are generally understood. It sprang from a general, if not well-nigh universal, belief that the present system of marketing is expensive and wasteful, and results in an unconscionable spread between what is paid the producer and that charged the consumer. It was for the purpose of encouraging efforts to bring about more direct marketing methods, thus benefiting both producer and consumer, and thereby promoting the general interest and the public welfare, that the legislation was enacted."

Burley Tobacco Society v. *Gillaspy* (1912) 51 Ind. App. 583, 100 N. E. 89, is an opinion that has been frequently quoted and cited by the courts with approval. With respect to the legislative right to authorize combinations of farmers for co-operative marketing and to determine the public policy of the state in this connection by appropriate legislation, the court said:

"Public policy in one part of the country may or may not be the public policy of another part. Likewise, the public policy of one time may or may not be the public policy of another time. Our complex and changing civilization is especially marked and distinguished by our view of public policy, which is not the same to-day as it was a decade ago, or as it probably will be a decade hence. Whatever it may be or may not be, all authorities agree that public policy in a state is declared and made certain when disclosed by a sustained line of decisions by the judicial branch of government, or by the legislative branch, when it finds definite and exact expression in statutory enactments. And when the public policy of a people is thus crystallized into law, such

law will be deemed to be the final word in expressing the popular policy in that behalf."

This thought was ably expressed by Mr. Justice Peckham, speaking for this court in *U. S.* v. *Freight Association*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. ed. 1007, when he said:

> "The public policy of the government is to be found in its statutes, and, when they have not directly spoken, then in the decision of the courts, and the constant practice of government officials; but when the law-making power speaks upon a particular subject over which it has constitutional power to legislate, public policy in such a case is what the statute enacts."

The necessity for a consideration of new and changing conditions in the application of constitutional principles is well stated by Mr. Justice Sutherland in his opinion sustaining an Ohio zoning law. *Village of Euclid* v. *Ambler Realty Co.* No. 31, October Term 1926, decided Nov. 22, 1926. He said:

> "Building zone laws are of modern origin. They began in this country about twenty-five years ago. Until recent years, urban life was comparatively simple; but with the great increase and concentration of population, problems have developed, and constantly are developing, which require, and will continue to require, additional restrictions in respect of the use and occupation of private lands in urban communities. Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive. Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit street railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for while the

meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise."

D. Connolly v. Union Sewer Pipe Company (1902), 184 U. S. 540, 46 L. ed. 679, considered and distinguished.

The chief reliance of the plaintiff in error is on the decision of this court in the *Connolly case, supra,* rendered some twenty-four years ago.

Since that time changed economic conditions have necessitated the formation of co-operative associations of agricultural producers, and this change in economic conditions has been recognized in the public policy of the nation and of the several states and declared by both courts and law-making bodies, as previously described.

The Connolly case is not applicable to such co-operative associations and was not intended to prevent the legislatures of the several states from adopting legislation to enable farmers to co-operate for the purpose of selling their products to the best advantage.

When the Connolly case was decided in 1903 the interests of the farmers were not represented. At that time the economic distinction between agricultural and other classes based upon the difference between individual production and group production was not developed. The fundamental differentiation between the agricultural group and the industrial group was first articulated in 1916. When the Connolly case was decided farm co-operation was largely local in character. Since 1916 the principle of organization upon the basis of the commodity has replaced the older conception of organization on the basis of locality. These new inter-

pretations on the economic side require a revision of legal dicta to conform modern legal principles to present economic principles and conditions which were not known at the time the Connolly case was decided.

The Connolly case has frequently been cited in a vain endeavor to induce the courts to declare the standard co-operative marketing acts invalid and has uniformly been held by the courts to relate to a different situation and to be entirely inapplicable to co-operative associations organized in accordance with co-operative marketing laws.

The Connolly case was an action by the Union Sewer Pipe Company to recover the purchase price of sewer pipe delivered to the defendants. The defendants admitted receiving the pipe and using it, and did not dispute the amount due. Their sole defense was that the Union Sewer Pipe Company was a member of a combination contrary to the Sherman Anti-Trust Law and the Anti-Trust Law of the State of Illinois. The court held that the contracts under which the pipe was delivered had nothing to do with the alleged combination and that it would be clearly unjust to permit the defendants to escape the payment of the admitted purchase price of the pipe by the collateral pleading of the Sherman Anti-Trust Law or the common law against trusts and monopolies.

However, the Illinois Anti-Trust Act provided in Section 10 that any purchaser of any article from an association transacting business contrary to the Act might plead the Act as a defense to any suit for payment of the article purchased. Hence, the question arose as to the validity of the Illinois Anti-Trust Act. Section 9 of the Act provided as follows:

> "The provisions of this Act shall not apply to agricultural products or live stock while in the hands of the producer or raiser."

This Court held that the above section permitted farmers and the raisers of live stock to do things which the law made a crime when done by any other persons. For this reason the Court held that the Anti-Trust Law was discriminatory and violated the guarantee of equal protection contained in the Fourteenth Amendment. It is to be noted that no agricultural producer or farm representative appeared in the case and that no question concerning agricultural producers was involved. The sole question involved was whether the purchaser of sewer pipe should be permitted to escape paying the agreed price for the pipe received and used by him by reason of the provisions of the Illinois Anti-Trust Act. Neither the plaintiff or defendant were agriculturists nor were they concerned about the welfare of agriculture. Nor were any farmer groups represented in the argument of the case.

There can be little question that the actual decision in the *Connolly case* was fair and just as between the parties. However, it would be unfair and unjust to extend the language of that decision beyond the facts of the case and apply such language to a new and changed condition which was not known or contemplated when the *Connolly case* was decided.

The distinctions between the present case and the *Connolly case* are numerous and obvious.

First, the section of the *Illinois Anti-Trust Act* which was held invalid in the *Connolly case* was a pure exemption which permitted farmers and live stock raisers to do what was condemned by the Act as criminal when done by others. On the other hand, the Co-operative Marketing Act is an incorporation statute which authorizes the formation of a specific type of corporation to enable agricultural producers to market their products collec-

tively under rigid laws to safeguard the public. It does not exempt farmers as such or live stock raisers as such from the Anti-Trust Acts, but provides that this new and limited type of corporation authorized by the Act shall not be considered in restraint of trade or as an illegal monopoly under such laws.

Second, section 9 of the *Illinois Anti-Trust Act* which was condemned in the *Connolly case* permitted agricultural producers and stock raisers to form any kind of combination or monopoly for the purpose of price-fixing or for limiting production, although similar acts done by others were condemned as criminal. *Section* 28 of the *Bingham Co-operative Marketing Act* does not authorize or permit the possibility of co-operative associations limiting production, enhancing prices, or restraining trade to the public injury. On the other hand, the purpose for which co-operative associations are authorized is to promote trade and to enable producer and consumer to bring about a reasonable price for agricultural products by eliminating waste, by making marketing as direct as possible between producer and consumer, and by substituting orderly marketing for speculative manipulation of markets.

Section 28 of the *Bingham Co-operative Act* provides that the *structure* of organizations formed in accordance with the Act shall not be considered a violation of the Anti-Trust Laws. It does not permit such associations to indulge in *overt acts* of unfair competition, fraudulent rivalry, or oppressive conduct. In this respect it is totally different from the exemption condemned in the *Connolly case*. That exemption permitted farmers and stock raisers to do overt acts in violation of law. The Co-operative Marketing Act does not permit farmers as such, or co-operative associations as such, to do any

overt acts for the purpose of unfairly crushing competition or unduly enhancing prices or unreasonably limiting production, which are prohibited by the Anti-Trust Laws when done by others. It simply provides a structure or form of organization which enables farmers to combine their efforts for joint marketing under definite limitations, and declares that associations adopting that structure shall not, by reason thereof, be held to be a combination prohibited by law. An example of these definite limitations is the provision that such associations may not deal in the products of outsiders or of non-member producers.

Third, section 9 of the *Illinois Anti-Trust Act* exempts agricultural producers and stock raisers from all legal limitations. On the other hand, the Co-operative Marketing Act brings associations of agricultural producers under the strict control of law. For example, such associations are prevented by law from making a profit. The government appoints public directors to represent the public interest in the administration of such associations. Complete publicity is assured by annual reports containing a complete accounting of the business of such associations. Group or centralized control of its policies is made impossible by the provision of one vote for each member regardless of the size of his crop or his interest.

Finally the co-operative association is prevented from unfair competition by the requirement that it shall deal only in the products of its members and shall deal with such products upon a basis of impartial equality.

Fourth, the exemption condemned in the *Connolly case* covered individuals owning agricultural products or live stock produced by them. The Co-operative Marketing Act does not afford any exemption to individuals, but enables agricultural producers, through

the corporate form, to do exactly what industry and capital are permitted to do. It is not an Act which produces inequality, but an Act which aims to place agriculture upon a basis of equality with industry. All products, except agricultural products, may be produced collectively, and usually are. The law permits the formation of business institutions to bring together capital and labor for the joint production of manufactured products, and likewise, authorizes the collective marketing of such products. For example, the United States Steel Company produces steel through the joint efforts of thousands of workers and markets its steel through a corporate selling organization. It would be impossible to give each steel worker the number of tons of steel per week produced by his individual effort and send him out to market the steel produced by him individually.

On the other hand, farming is characterized by individual production. Except for the co-operative association, each individual farmer is required to carry his product to market and to sell the same individually. Individual marketing by farmers may be likened to an attempt by each individual steel worker to market individually the steel produced by him.

Group production makes inevitable group selling. Individual production can only achieve group selling or intelligent merchandising by the intervening step of co-operation.

Collective selling is the rule in the markets where the farmer must buy. The farmer buys his equipment from a harvester corporation; he buys his fertilizer from a fertilizer corporation, etc. The Co-operative Marketing Act provides a system to enable the farmer to partly overcome this inequality and to secure the advantages of group marketing and collective selling which are en-

joyed by industry and manufacturers through corporate form. There is no more reason why one farmer should be compelled to compete in the sale of his product against his neighbor then there would be to compel one steel worker to compete in the sale of the steel produced by him with his fellow worker engaged in a like production. Hence, there is no reason why the legislature should not place the industrial group and the farming group upon the same basis, although the differences between agriculture and industry require a different form or type of corporate organization. That promotes equality, not inequality. That is reasonable, not arbitrary.

Fifth, there is another wide distinction between the present case and the *Connolly case*. In the Connolly case there was a specific Illinois statute with respect to trusts and combinations condemning certain acts and combinations. There is no such law in Kentucky. Kentucky is one of the states of the Union where the so-called Anti-Trust Acts have been repealed and where the common law alone prevails. In the present case it was competent for the legislature to declare what form of organization and what combinations should be considered reasonable and within the provisions of law. By providing in the Bingham Act that co-operative associations should not be condemned as unreasonable combinations in restraint of trade, the legislature did not make similar acts done by others criminal or in any way discriminate against other groups or classes.

Therefore, in the present case there can be no dispute of the right of the legislature to adopt section 28, and no question that the declaration made in such section does not deny the equal protection of laws. For the reasons stated herein, we believe that the corresponding sections of similar laws in states which have definite Anti-

Trust Acts are a proper exercise of legislative power; but that is particularly true in the present case where no such Anti-Trust Act exists.

Upon this point the Kentucky Court of Appeals said in its opinion in this case:

> "We may add to what was said in that opinion (*Potter* v. *The Dark Tobacco Growers Ass'n*) that there is no statute at present in this state, nor was there any when the cause of action herein arose, against pools, trusts, and monopolies, and by the Clayton Amendment to the Sherman Anti-Trust Act (38 Stat. 730) agricultural products were expressly excluded from that act; which left, as the only law against such combinations, the common law, provided it prevailed in this state as to agricultural products after the enactment of the Bingham Act. It is, however, conceded that it is competent for a Legislature to repeal the common law prevailing in the jurisdiction where it sits, the same as it may repeal a prior statutory enactment, and section 28 of the Bingham Act expressly provides that the organization of the co-operative marketing companies provided for by it shall not be deemed 'to be a conspiracy nor a combination in restraint of trade nor an illegal monopoly; nor an attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this state.' It is then provided in the same section that— • • •
>
> "It would therefore seem that section 28 of the act expressly repealed any rule of the common law that might prevail in this state militating against the legality of such contracts."

Although the decision that the Union Sewer Pipe Company was entitled to collect the purchase price of the pipe bought by the defendants in the *Connolly case* is not questioned, it can fairly be said that the intervening years have done much to justify the criticism of the reasoning in that case voiced in the vigorous and able dissent of Mr. Justice McKenna.

Mr. Justice McKenna points out that in *American Sugar Refining Company* v. *Louisiana*, 179 U. S. 89, 45 L. Ed. 142, this Court sustained a license tax imposed on persons engaged in the business of refining sugar and molasses, but exempted "planters and farmers grinding and refining their own sugar." There can be no question at this time of the soundness of his statement, at page 370:

> "The equality of operation which the Constitution requires in state legislation cannot be construed, as we have seen, as demanding an absolute universality of operation, having no regard to the different capabilities, conditions, and relations of men. Classification, therefore, is necessary, but what are its limits? They are not easily defined, but the purview of the legislation should be regarded. A line must not be drawn which includes arbitrarily some persons who do and some persons who do not stand in the same relation to the purpose of the legislation. But a wide latitude of selection must be left to the legislature. It is only a palpable abuse of the power of selection which can be judicially reviewed, and the right of review is so delicate that even in its best exercises it may lead to challenge. At times, indeed, it must be exercised, but should always be exercised in view of the function and necessarily large powers of a legislature."

With respect to the differences which warrant the classification of agriculturists, Mr. Justice McKenna said at page 371:

> "But are there not, between the classes which the statute makes, distinctions which the legislature had a right to consider? Of whom are the classes composed? The excluded class is composed of farmers and stock raisers while holding the products or live stock produced or raised by them. The included class is composed of merchants, traders, manufacturers, all engaged in commercial transactions. That is, one class is composed of persons who are scattered on farms; the other class is composed of persons con-

gregated in cities and towns, not only of natural persons, but of corporate organizations. In the difference of these situations, and in other differences which will occur to any reflection, might not the legislature see difference in opportunities and powers between the classes in regard to the prohibited acts? That differences exist cannot be denied. To describe and contrast them might be invidious. To consider their effect would take us from legal problems to economic ones, and this demonstrates to my mind how essentially any judgment or action based upon those differences is legislative and cannot be reviewed by the judiciary."

In *New York Central Railroad Company* v. *White* (1917), 243 U. S. 188, 61 L. Ed. 187, this Court sustained the exemption of farmers from the operation of the Workmen's Compensation Act of New York. In the fourth paragraph of the syllabus the Court said:

"The exclusion of farm laborers and domestic servants from the compulsory compensation scheme of the New York Workmen's Compensation Act (N. Y. Laws 1913, Chap. 816; Laws 1914, Chaps. 41 and 316) is not such an arbitrary classification as to contravene the equal protection of the laws clause of U. S. Const. 14th Amend., since it reasonably may be considered that the risks inherent in these occupations are exceptionally patent, simple, and familiar."

In *Miller* v. *Wilson* (1915), 236 U. S. 373, 59 L. Ed. 628, the exemption of the fruit and canning industries from the Woman's Eight-Hour Law of California was held constitutional.

In the course of the opinion, Mr. Justice Hughes said at page 380:

"As the liberty of contract guaranteed by the Constitution is freedom from arbitrary restraint,—not immunity from reasonable regulation to safeguard the public interest,—the question is whether

> the restrictions of the statute have reasonable relation to a proper purpose."

and at page 382 he said:

> "The legislature is not debarred from classifying according to general considerations and with regard to prevailing conditions; otherwise, there could be no legislative power to classify. For it is always possible by analysis to discover inequalities as to some persons or things embraced within any specified class. • • • Frequently such groupings may be made with respect to the general nature of the business in which the work is performed; and, where a distinction based on the nature of the business is not an unreasonable one, considered in its general application, the classification is not to be condemned."

The *Connolly case* has been distinguished by this Court in *Billings* v. *Illinois* (1903), 188 U. S. 97, 47 L. Ed. 400, in which the Illinois Inheritance Tax Law was sustained against the claim that it denied the equal protection of the laws.

Again, in *Cox* v. *Texas*, 202 U. S. 446, 50 L. Ed. 1099, the Connolly case was again distinguished. In that case Mr. Justice Holmes said at page 450, that the argument based upon the Connolly case was fallacious and that:

> "'*Farmers and stockraisers are classes naturally existing in the community, carrying on distinct callings, and not likely to be engaged in anything else.*"

In *Duplex Printing Press Company* v. *Deering* (1921), 254 U. S. 443, 65 L. Ed. 349, this Court had occasion to consider section 6 of the Clayton Act which exempts labor and agricultural organizations organized for mutual help, and not having capital stock or contemplated for profit, from the Anti-Trust Laws. Section 6 of the Clayton Act is similar to Section 28 of the Bingham Act in its intent and purpose. This Court did not question

the validity of section 6 of the Clayton Act and construed it as authorizing the existence and operation of the organizations mentioned in the Act, but not as enabling a "normally lawful" organization become "an illegal combination or conspiracy in restraint of trade," as defined by the Anti-Trust Laws. Concerning section 6, Mr. Justice Pitney said:

> "The section assumes the normal objects of labor organizations to be legitimate, and declares that nothing in the Anti-Trust Laws shall be construed to forbid the existence and operations of such organizations, or to forbid their members from lawfully carrying out their legitimate objects; and such an organization shall not be held in itself—merely because of its existence and operation—to be an illegal combination or conspiracy in restraint of trade."

E. The Connolly case has uniformly been held inapplicable to co-operative marketing cases.

Although the Connolly case has frequently been cited to support the claim that Co-operative Marketing Acts are unconstitutional, that claim has everywhere been denied.

In *Dark Tobacco Growers Co-operative Association* v. *Dunn* (1924), 150 Tenn. 612, 266 S. W. 308, the Court said:

> "It is further insisted that the Bingham Act violates the equal protection clause of the Fourteenth Amendment to the federal Constitution (a defense not interposed in the Mason Case), and counsel cite and rely upon *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 22 S. Ct. 431, 46 L. Ed. 679, in which the Supreme Court held that the Illinois Anti-Trust Statute violated said provision of the Constitution because it excepted from the provisions of the act 'agricultural products or live stock while in the hands of the producer or raiser.'
>
> "In that case the court was dealing with a statute

which made trusts or combinations in restraint of trade a crime, but which excepted from its provisions 'producers of agriculture and raisers of live stock.' Certainly no reasonable justification could be offered in support of a classification of that nature. If it is wrong for a merchant to monopolize a particular business, it is likewise wrong for a farmer to do so. The principle is the same in both cases. If the act here involved has for its object the destruction of competition and the creation of a monopoly, then it violates the equal protection clause of the Constitution and is invalid.

"In the Mason Case this court held, in effect, that the Bingham Act did not authorize a trust or combination, but rather negatived any such idea by the twenty-eighth section, as follows:

" 'Any association organized hereunder shall be deemed not to be a conspiracy nor a combination in restraint of trade nor an illegal monopoly; nor an attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this state; and the marketing contracts and agreements between the association and its members and any agreements authorized in this act shall be considered not to be illegal nor in restraint of trade nor contrary to the provisions of any statute enacted against pooling or combinations.'

"The purpose of the act is set forth in section 1, as follows:

" 'In order to promote, foster and encourage the intelligent and orderly marketing of agricultural products through co-operation, and to eliminate speculation and waste; and to make the distribution of agricultural products between producer and consumer as direct as can be efficiencly done; and to stabilize the marketing of agricultural products, this act is passed.'

"Giving the act full faith and credit, and taking into consideration the history of co-operative associations, it appears that the purpose is to reduce rather than increase the price paid by the consumer, and thereby created a demand for larger quantities of farm products. The object sought is an increased

return to the producer by eliminating speculation and waste, obviating dumping, reducing freight rates, marketing in an orderly and economic manner, making the distribution of agricultural products between producer and consumer as direct as can be efficiently done, studying marketing problems from the standpoint of the consumer, and creating new markets."

Kansas Wheat Growers Association v. *Charlet* 5), 118 Kan. 965, 236 P. 657, the Supreme Court of sas said:

"Defendant contends the Co-operative Marketing Act contravenes the Constitution of the United States because it permits a monopoly which would otherwise be condemned by the Anti-Trust statute, and so creates an exception to the Anti-Trust statute, for the benefit of a favored class. The case of *Connolly* v. *Union Sewer Pipe Co.* 184 U. S. 540, 22 S. Ct. 431, 46 L. Ed. 679, *is cited*. One flaw in the contention consists in the fact that the Co-operative Marketing Act does not create monopoly of the kind denounced by the Anti-Trust Act. *Wheat Growers' Association* v. *Schulte*, 113 Kan. 672, 216 P. 311."

List v. *Burley Tobacco Growers' Co-operative Asso-on* (1926), 114 O. S. 361, 151 N. E. 471, the Supreme t of Ohio said:

"The *Connolly case* has been cited a score of times in later decisions of the United States Supreme Court without being overrruled, and it is not strange that it should be so cited, because it went to such unusual lengths in declaring principles of discrimination that it became a potent authority in every subsequent case where legislative discrimination was condemned. Mr. Justice McKenna wrote a dissenting opinion, the logic of which is unanswerable. He pointed out a number of cases which had theretofore quite recently been decided by that court in which the court had sustained classifications depending upon differences in the amount of legacies; differences between corporations; differences between land dependent for its use on agriculture, and land de-

pendent on other purposes, in regard to the power of a city to annex it; differences between fire insurance and other insurance; differences between the work of a barber and other labor, as to its necessity; differences between hiring persons to labor within the state and without the state; and, last, but not least, differences between sugar refiners based solely upon whether the sugar to be refined was produced or purchased by the refiner. He then pointed out more particularly the inconsistency between the current case and the *American Sugar Refining Co.* v. *Louisiana*. * * * Many years later the Supreme Court considered other cases in which the principles of the Connolly Case have apparently been reversed."

The court then considers these cases, including *New York Central Railroad Co.* v. *White*, 243 U. S. 188; *Miller* v. *Wilson*, 236 U. S. 373; and *International Harvester Co.* v. *Missouri*, 234 U. S. 199, and continues:

"Many other cases have been decided by the United States Supreme Court which sustain the validity of statutes which create classifications, and it is the underlying principle of all decisions which uphold statutes creating reasonable classifications that the principle of equality is fulfilled if equality is observed between the members of a class, and that it is violated if such equality is not observed.

"It is manifestly impossible to maintain an absolute universality of operation, and it is inevitable that due regard must be paid to different capabilities, conditions, and relations between men and physical forces. The courts have universally approved classifications, and the only difficulty has been to determine the limits thereof. These limits have never been defined and each case must in large measure be decided upon its own peculiar facts, circumstances and conditions. Manifestly there must be a wide latitude of selection left to the Legislature, and it is only when that power of selection has been abused that the courts may interfere.

"In determining whether co-operative associations organized for the purpose of marketing agri-

cultural products are such a favored class as to be within the inhibitions of the fourteenth amendment, we must look to the fact that persons engaged in agriculture are widely scattered and compose so numerous a class that it is a physical and economic impossibility to combine them all in any commercial enterprise, and we should further look to the fact that many of them are very small producers, of such limited means that they must market their products immediately after harvesting, and are therefore at the mercy of purchasers, without any voice whatever in making prices or terms. It must be recognized on the other hand that merchants and manufacturers dealing in any single line of agricultural products are comparatively few and congregated in definite localities. While this is not true of all agricultural production, it is certainly true of the tobacco industry. Such different situations and conditions were evidently considered by the Legislatures of the different states and by Congress, whose duty and province it is to consider the economic problems involved. Such legislative acts should not be held to be invalid and unconstitutional, unless clearly violative of the constitutional inhibition."

In *Minnesota Wheat Growers Co-operative Marketing Association* v. *Huggins* (1925), 162 Minn. 471, 203 N. W. 220, the court said:

"The Connolly Case very properly says they cannot be permitted to do with impunity that which is a crime for others to do. In this statute the producers are not permitted to do anything which under our laws is made a crime when done by others. The law in question classifies an industry, and makes this law apply with absolute equality to all of those who bring themselves within the conditions imposed by the law, and we are of the opinion that it in no way violates the Fourteenth Amendment and is not in conflict therewith."

In *Northern Wisconsin Co-operative Tobacco Pool* v. *Bekkedal* (1923), 182 Wis. 571, 197 N. W. 936, the Court said:

"In order to vindicate the co-operative law it is

not necessary to justify the exemption of farmers from the general anti-trust statute, which was condemned as vicious classification in *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 22 Sup. Ct. 431, 46 L. Ed. 679. It may be remarked, however, that the decision in that case was made more than 20 years ago, since which time there is abundant evidence of a widespread conviction throughout our nation that the farmer is subject to economic conditions which put him in a class justifying special legislative consideration in many respects. It may be doubted whether at the present time the holding in *Connolly* v. *Union Sewer Pipe Co.*, in this respect, would be followed."

The Wisconsin Court added:

"When we reflect that a state may encourage steam laundries and discourage hand laundries (*Quong Wing* v. *Kirkendall*, 233 U. S. 59, 32 Sup. Ct. 192, 56 L. Ed. 350), require a license fee of elevators situated on railroad right of way, though none is required of elevators not so situated (*W. W. Cargill Co.* v. *Minnesota*, 180 U. S. 452, 21 Sup. Ct. 423, 45 L. Ed. 619), require a license tax upon persons and corporations carrying on the business or refining sugar and molasses, though excluding planters and farmers grinding and refining their own sugar and molasses (*American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89, 21 Sup. Ct. 43, 45 L. Ed. 102), impose a license tax on persons in hiring laborers to be employed beyond the limits of the state, though none is required of those engaged in the business of hiring persons to labor within the state (*Williams* v. *Fears*, 179 U. S. 270, 21 Sup. Ct. 128, 45 L. Ed. 186), select the business of fire insurance as a special target for anti-monopolistic regulation (*Carroll* v. *Greenwich*, 199 U. S. 401, 26 Sup. Ct. 66, 50 L. Ed. 246), it is difficult to see how a law like this can be condemned, because it denies the equal protection of the laws, at least upon the attack of the defendants in this case."

The conclusion, from what has been said under this heading and from the cases quoted, is that the Co-opera-

tive Marketing Act provides a system of marketing agricultural products and a classification reasonably necessary to meet the needs of agricultural producers. Such classification is abundantly supported by the decisions of this Court and applies equally to all agricultural producers without discrimination. The decision in the *Connolly Case* related to an entirely different situation and did not contemplate and was not intended to cover the change in economic conditions and present public policy with respect thereto. The exemption of agricultural producers condemned in the *Connolly Case* is not parallel to the authority contained in the Co-operative Marketing Acts to form co-operative associations under public regulation and supervision without violating the Anti-Trust Laws.

The uniform and unbroken current of judicial decision holds that such laws do not deny equality of protection and do not violate the Fourteenth Amendment to the Federal Constitution.

II.

SECTIONS 26 AND 27 ARE REASONABLE AND NECESSARY PROVISIONS TO MAKE THE CO-OPERATIVE MARKETING SYSTEM PRACTICAL AND EFFECTIVE AND TO SAFEGUARD THE MARKETING CONTRACT BETWEEN THE ASSOCIATION AND ITS MEMBERS FROM BREACH DELIBERATELY INDUCED BY THIRD PERSONS OUTSIDE THE ASSOCIATION.

Section 26 of the *Bingham Co-operative Marketing Act* provides:

> "Any person or persons or any corporation whose officers or employees knowingly induce or attempt to induce any member or stockholder of an association organized hereunder to breach his marketing contract with the association, or who maliciously and

knowingly spreads false reports about the finances or management thereof, shall be guilty of a misdemeanor and be subject to a fine of not less than one hundred ($100) dollars and not more than one thousand ($1,000) dollars for each such offense; and shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred ($500) dollars for each such offense."

Section 27 of the same Act specifically covers the case of the owner of a loose leaf auction warehouse who deliberately induces a member of a co-operative marketing association to break his contract with the Association and sell his tobacco over the auction floor of the warehouse. This section reads:

"Any person, firm or corporation conducting a warehouse within the State of Kentucky who solicits or persuades or permits any member of any association organized hereunder to breach his marketing contract with the association by accepting or receiving such member's products for sale or for auction or for display for sale, contrary to the terms of any marketing agreement of which said person or any member of the said firm or any active officer or manager of the said corporation has knowledge or notice, shall be liable to the association aggrieved in a civil suit in the penal sum of five hundred ($500) dollars for each such offense; and such association shall be entitled to an injunction against such warehouseman to prevent further breaches and a multiplicity of actions thereon. In addition, said warehouseman shall pay to the association a reasonable attorney's fee and all costs involved in any such litigation or proceedings at law.

"This section is enacted in order to prevent a recurrence or outbreak of violence and to give marketing associations an adequate remedy in the courts against those who encourage violation of co-operative contracts."

A like provision (Laws 1908, c. 8) to protect contracts authorized by a prior co-operative marketing law was upheld by the Court of Appeals of Kentucky in *Commonwealth* v. *Hodges* (1910), 137 Ky. 233, 125 S. W. 689.

The authority of that case has never been questioned and it has frequently been cited with approval.

Section 27 of the *Bingham Co-operative Marketing Act* was specifically upheld in the present case. *Liberty Warehouse Co.* v. *Burley Tobacco Growers Co-operative Association* (1925), 208 Ky. 643, 271 S. W. 695. An almost identical provision of the *Virginia Co-operative Marketing Act* (*Acts extra session* 1923, page 131) was sustained by the Supreme Court of Appeals of Virginia in *Tobacco Growers Warehouse Ass'n* v. *Danville Warehouse Co., Inc.* (1926), ____ Va. ____, 132 S. E. 482.

The right of the Legislature to protect the co-operative marketing contract against attack by outsiders was specifically upheld by the Supreme Court of Wisconsin in *Northern Wis. Co-op. Tobacco Pool* v. *Bekkedal et al.* (1923), 182 Wis. 571, 197 N. W. 936, and by the Court of Appeals of Texas in *Hollingsworth et al.* v. *Texas Hay Ass'n* (1923), 246 S. W. 1068, approved by the Supreme court in *Texas Farm Bureau Cotton Ass'n* v. *Stovall* (1923), 113 Tex. 273, 253 S. W. 1101.

Standard Co-operative Marketing Acts which contain generally similar provisions have been sustained in numerous cases previously cited.

The only exception is *Minnesota Wheat Growers Co-operative Marketing Association* v. *Radke* (1925), ____ Minn. ____, 204 N. W. 314, which we believe contrary to the overwhelming weight of authority and not applicable to the tobacco marketing situation.

A. The marketing contract is the cornerstone of the co-operative marketing structure.

The co-operative marketing association is formed for the purpose of marketing the products of its members. The association has only one way of obtaining such prod-

ucts, namely, by the member delivering his product
the association in accordance with the terms of the ma
keting contract between the member and the associatio

The association has no capital. It is prohibited fro
buying products in the open market or selling produc
of non-members. Its function is limited exclusively
selling and handling the products of members, delivere
under the marketing contract with the member. Unle
the marketing contract of the association with its mem
bers is performed, the association can not function an
the whole co-operative marketing system necessaril
fails.

For that reason, it is essential to the success of c
operative marketing that definite provision be containe
in the Co-operative Marketing Act to assure the pe
formance of the marketing contract and to safeguar
that contract against interference or breach by outsider

To assure the performance of the contract by *mem*
bers, Section 18 was enacted, entitled "Remedies fo
breach of contract" and giving the association the rig
(a) to recover liquidated damages upon a breach of th
contract; (b) to obtain an injunction to prevent a breac
or further breach of the contract; and (c) to obtain
decree of specific performance of the contract.

To safeguard the contract against breach induced b
outsiders, Sections 26 and 27 were adopted.

**B. The Legislature has a right to protect such co
tract against breach which threatens marketing syste**

The entire subject is ably discussed in *Commonwealt*
v. *Hodges* (1910), 137 Ky. 233. In that case the cou
considered a statute which provided that any person wh
induced or persuaded another to violate a co-operativ

marketing contract should be liable for the reasonable expense and attorney fee incurred by the injured party, and that any person who knowingly purchased products covered by such co-operative contract without the consent of the association should be fined not exceeding $250.00. The court upheld the act and in so doing said, in part:

> "It is first insisted that the law is invalid for the reason that the Legislature has no power to make the violation of a simple contract a crime. In considering this question we must remember that courts have nothing to do with the policy of the statute. When the constitutional power of the Legislature to enact a law is questioned, the sole duty of the judicial department of the government is to look to the provisions of the federal and state Constitutions, and if they do not, in express terms or by necessary and proper implication, forbid the exercise of such power, the enactment must be adjudged valid and enforcible as a law. Beyond the constitutional restrictions thus to be interpreted the only limits upon the state Legislature in enacting laws are its own wisdom, sound judgment, and patriotism. Furthermore, where it is not clear that the fundamental law has been invaded, courts will rarely, if ever, interfere to arrest the operation of legislative enactments."

The court then recites examples showing that the matter of contracts has always been the subject of legislation and refers particularly to statutes making it unlawful "for a person fraudulently to sell or dispose of mortgaged property, an act, which, it must be conceded, is nothing more nor less than a violation of a simple contract." The court refers to the conditions which made co-operative marketing necessary and particularly to the fact that a party who sells pooled products is not violating his own contract but is doing an injury to every

member of the co-operative association. Upon this poin
the court said:

> "Thus it will be seen that *the party who sel*
> *pooled products without the written consent of th*
> *agent to whom it is pooled is not guilty simply of vi*
> *lating his own contract.* Manifestly those who
> into such a pool do so for the purpose of having th
> pool effective. It would not be effective if only on
> two, three or four should enter into the combin
> tion. Each man who enters the pool goes into
> upon the assurance of the good faith of the other
> When a party enters the pool, good faith requir
> that he shall keep his contract. *If he fails to ke*
> *his contract, his act is one of bad faith towards th*
> *other poolers.* While the law in question gives th
> right of damages to one aggrieved by an unlawf
> sale of pooled products, and also the right to obta
> an injunction to prevent such sale, it is manife
> that in many instances such means of protecti
> would prove ineffectual. *Sometimes the pooler wou*
> *be insolvent, and an action for damages would r*
> *sult only in costs.* Again, the pooled product mig
> be sold before the owner could be enjoined. *To pr*
> *vent such a state of case, the unlawful selling*
> *pooled products was made a misdemeanor.* As w
> said by the Supreme Court of South Carolina in th
> case of *State* v. *Williams*, 32 S. C. 124, 10 S. E. 87
> 'If the General Assembly sees fit to make the viol
> tion of a particular species of civil contracts a cri
> inal offense, we are unable to discover in the pro
> sions of the Constitution anything which forbi
> such legislation.' The power of the Legislature
> declare that which is perfectly innocent in itself
> be unlawful is beyond question. *Lauton* v. *Stee*
> 152 U. S. 133, 14 Sup. Ct. 499, 38 L. ed. 385."

Commonwealth v. *Hodges* was an action [like the o
at bar] against outsiders who induced a member to bre
his contract. The court discusses the motives of su
outsiders and the necessity for a penalty to prevent u
lawful conduct upon their part. The court also explai
that outsiders who are punished for inducing a brea
of contract are not deprived of their right to acqui

property because they have no right to acquire property from those who have no right to sell. On these points, the court said in the *Hodges case*, 125 S. W. at page 693, col. 2:

> "In the case before us, however, appellees are not members of the pool, but are purchasers of the pooled product. The charge against them is that they purchased the tobacco in question knowing it to be pooled, without the written consent of the pooling agent. Having held that it was within the power of the General Assembly to make it unlawful for the owner of pooled products to violate his pooling contract by selling without the written consent of the agent, *we think it was likewise within its power to enact that a party who knowingly purchased pooled products, without the written consent of the agent, and who thus assisted in, and brought about the violation of, the pooler's contract, should also be punished.* The reason for this part of the act was due to the fact that the sole buyer of tobacco was interested in breaking up the pool which prevented him from securing the tobacco at a price far below its market value. If no punishment were imposed upon the party who knowingly purchased pooled tobacco without the written consent of the pooling agent, it would be within his power to offer great inducements to the poolers to violate their contracts, and thus destroy the pool. To guard against this condition, the provision in regard to purchasers was inserted in the act. Such a provision does not interfere with their right to acquire property, *for they have no right to acquire property from those who have not the right to sell.* That being the case, the provision in regard to purchasers is not invalid on the ground that the Legislature had no right to make it a misdemeanor knowingly to purchase pooled tobacco without the written consent of the pooling agent." (Italics ours.)

The court held that the Act did not violate the 14th Amendment to the Federal Constitution. In so holding, the court said at page 694:

> "*It is simply a case where the Legislature re-*

garded a certain class of contracts of sufficient public importance to make their violation a misdemeanor. The act itself does not exempt others; it is silent. In order for a statute imposing a penalty to be valid, it is not necessary that all other acts of a similar character should be punished. As well might the bookmaker, who sells pools and who is subject to punishment therefor, complain of the denial of the equal protection of the laws because, under the statutes of this state, others may with impunity sell pari-mutuel pools upon race tracks. Furthermore, the pooling act is not compulsory; it is optional with the farmer whether or not he enters the pool. The act was passed for his benefit. If he desires to avail himself of its privileges, he must accept the conditions imposed by the statute. If, having voluntarily pooled his product, he sees fit to violate his contract, and subject himself to the punishment prescribed by the statute, we fail to perceive how he may justly complain of a denial of the equal protection of the law merely because the Legislature has not made it a misdemeanor for others to violate their pooling contracts.

"*But appellees, who are complaining of the law in question, do not belong to the class who pool their products; they belong to the purchasing class. It is their contention that they are denied the equal protection of the laws because they are liable to punishment for purchasing products pooled by the farmer, whereas it is not made a crime to purchase articles pooled by others.* In other words, they insist that the act discriminates between purchasers of products mentioned in the act and purchasers of other pooled products. Manifestly there is no merit in this contention. The alleged discrimination is altogether fanciful. All who purchase pooled products under the circumstances denounced by the statute are alike guilty. They are not discriminated against because purchasers of other pooled products may not be punished. They have the like privilege of purchasing other pooled products without subjecting themselves to punishment. They cannot complain when all others who commit the offense denounced by the statute are punished in like manner.

Nor can they complain because others may with impunity purchase products other than those mentioned in the statute, if they may do the same thing with like impunity. We, therefore, conclude that the act in question does not deny, either to the farmer or to the class represented by appellees, the equal protection of the laws guaranteed by the fourteenth amendment to the Constitution of the United States." (Italics ours.)

With respect to *Section* 27 of the *Bingham Act*, the Court of Appeals said in its opinion in the case at bar (R. 35):

"What we have already said disposes of practically all of the objections from (a) to (h) enumerated above, with the exception of some to which we will now direct our attention. The first one is that it truthfully may be said that the imposition of the $500 penalty in section 27 of the Bingham Act does not give to plaintiff an additional cause of action for the violation of the pooler's contract. The member who violates his contract is not penalized to any extent by any of the terms of that section. They only apply to the denounced conduct of a warehouseman (a third party) in procuring, aiding, or abetting the member who violates his contract. If the contract is one in furtherance of a legislatively declared purpose, then it was no doubt competent for the Legislature to throw such restraints around it as was reasonably necessary to protect its integrity, and we do not think the imposition of the penalty, plus attorney's fees as a part of it, is in excess of the power or authority of the Legislature in exercising its rights to preserve the integrity of the contract. Indeed, similar statutes to accomplish the same purpose by establishing a deterrent against others procuring a violation of acquired rights, and not to augment plaintiff's damages for their breach, have been upheld in many courts of the country; some of the cases being *Atchison, Topeka, etc., Ry. Co.* v. *Matthews*, 174 U. S. 96, 19 S. Ct. 609, 43 L. ed. 909; *Chicago, etc. Ry. Co.* v. *Feintuch*, 191 F. 482, 112 C. C. A. 126; *Cleveland, etc. Ry. Co.* v. *Hamilton*, 200 Ill.

633, 66 N. E. 389; *Fidelity Mutual Life Association* v. *Mettler*, 185 U. S. 308, 325, 22 S. Ct. 662, 46 L. ed. 922; and many others which could be cited."

In *Hollingsworth et al.* v. *Texas Hay Ass'n* (1923), 246 S. W. 1068, certain hay dealers with knowledge of the obligation of the member to deliver his hay to the co-operative association, attempted to induce the member to break his contract. Concerning his act in so doing, the Court of Appeals said:

> "As concerns appellant Edwards, he could not knowingly aid, abet, and designedly assist a member in undermining such a contractual relationship and undertaking between others and then escape on the ground that he was an outsider and entitled to pursue his own private business in his own way. If the finding indicated as to his part in the transactions be justified, the interference with the rights of others was on his side entirely, and not only would it render him liable to the association in damages, pursuant to section 25 of this act, but also, under the general principles of equity, would confer upon it the right to enjoin him along with Hollingsworth. Article 4643, Revised Statutes of Texas; 14 Ruling Case Law, Injunction, par. 91, p. 390; *Grant County Board, etc.* v. *Allpkin*, 152 Ky. 280, 153 S. W. 417."

Section 25 of the *Texas Co-operative Marketing Act* referred to in the *Hollingsworth* case is similar to *Sections 26-27 of the Kentucky Act.*

In *Tobacco Growers' Co-op. Ass'n* v. *Danville Warehouse Co.* (1926), ___ Va. ___, 132 S. E. 482, the Supreme Court of Appeals of Virginia sustained the *Virginia Act* (Acts Extra Session 1923, page 131) of which *Section* 25, *a and b*, are practically identical with *Sections 26 and 27* of the *Kentucky Act*. The court holds that these sections are a necessary part of the entire plan to encourage co-operative marketing and to safe-

guard it against outside attack which would destroy its very existence. In this connection, the court said:

"It will be observed that section 25 of the act does not make it a criminal offense for a corporation conducting a warehouse to solicit or permit a member of the association to breach his marketing contract, but simply makes it liable to the association in a civil suit in a penal sum of not less than $100 nor more than $500 for each offense. The object of the act is to encourage the co-operative marketing of farm products in Virginia, and this is sufficiently expressed in its title. The best results in co-operative marketing could not be attained without the organization of co-operative marketing associations, or exchanges, and the enforcement of the contracts between the association and its members. The violation of contracts by its members would inevitably discourage those who were living up to their contracts, and militate against the success of the association. To minimize these violations it was necessary to protect the association against those who would knowingly solicit or permit members to breach their contracts. All these subjects are congruous, have a natural connection with, are germane to, and are reasonably necessary for, the accomplishment of the one object of the statute. This satisfies the requirements of section 52 of the Constitution."

C. Public policy to uphold contract.

The courts uniformly hold that the legislation in question expresses a public policy to uphold and protect cooperative marketing contracts in order to develop a system of marketing for the benefit and welfare of the inhabitants of the several states.

In *Manchester Dairy System, Inc.* v. *Hayward* (1926), __ N. H. __, 132 Atl. 12 (Advance Sheet, March 11, 1926), the Supreme Court of New Hampshire said:

"In view of the fact that a further hearing must be had, the question raised in argument whether the

contract is opposed to public policy has been considered. Co-operative marketing agreements, containing the essential features of the contract here considered, have been recognized in many of our states as a legitimate means of protecting its members against oppression, of avoiding the waste incident to the dumping of produce upon the market with the consequent wide fluctuations in prices and of securing to the producer a larger share of the price paid by the consumer for his products. Associations of the character here exist in practically all of our states and deal in nearly every form of agricultural product. From year to year the co-operative idea in marketing has been assuming wider scope and greater economic importance. Public approval of such co-operative organizations is evidenced by the adoption of enabling legislation in more than two-thirds of the states, including our own (Laws 1925, c. 33), as well as by the Congress (U. S. Comp. St. Ann. Supp. 1923, §§ 8716½, 8716½a). See Columbia Law Review, February, 1923, p. 91; *Co-op. Ass'n* v. *Jones*, 185 N. C. 265, 270, 117 S. E. 174, 33 A. L. R. 231. Such legislation has received liberal construction by the courts. *Minn. Wheat Growers' Association* v. *Huggins* (Minn. 1925) 203 N. W. 420 *et seq.* No sufficient ground appears from the record for holding that the contract here under consideration is contrary to public policy."

In *Warren* v. *Alabama Farm Bureau Cotton Association* (1925) Ala. 104 So. 264, the Supreme Court of Alabama said:

"So far as we are advised, no American court has condemned a co-operative marketing contract of the character of this complainant association as injurious to the public interest, or in any way violative of public policy. On the contrary, such contracts have been everywhere upheld as valid, if not positively beneficial to the public interest." (Citing cases.)

In *Burley Tobacco Growers Co-op. Ass'n* v. *Rogers* (1926) Ind. App. 150 N. E. 384 (Advance Sheet, March

2, 1926), the Court of Appeals with respect to the very contract before this court, said:

"The expressed public policy of this state, as disclosed by this court and the General Assembly, is to aid and encourage the co-operative marketing of farm products. *Burley Tobacco Society* v. *Gillaspy*, 51 Ind. App. 583, 100 N. E. 89; Acts 1925, p. 42. The organization of co-operative marketing associations, and the entering into marketing contracts between such associations and its members, appears to be an economical necessity, and it would be turning the wheels of progress backward to hold such contracts in restraint of trade, when in fact the effect and purpose of such contracts are to effectuate an orderly and economic method of marketing farm products, not merely in the interest of the producers, but in the interest of the general public as well.

"When the courts of every state, where the validity of statutes authorizing the organization of co-operative marketing contracts between such associations and their members has been assailed, have held such organizations and contracts legal, it would seem that the validity of such legislation and contracts was no longer an open question. Such organizations and contracts have been upheld by the courts of Alabama, California, Colorado, Kansas, Minnesota, Kentucky, Mississippi, Nebraska, New York, North Carolina, Tennessee, Texas, Washington, and Wisconsin."

In *List* v. *Burley Tobacco Growers Co-op. Ass'n* 1926) 114 O. S. 361, 151 N. E. 471, the Supreme Court f Ohio said:

"The American Government and the American people are committed to the maintenance of a resourceful, independent Agriculture, and it should be the effort of all the branches of our Government to aid Agriculture in maintaining its proper place in our economic structure, on equal terms with all other producing groups."

In *Arkansas Cotton Growers Co-op. Ass'n* v. *Brown* 1925) Ark. 270 S. W. 946, the court in sustaining a Co-

operative Marketing Act similar to the Kentucky A
said:

> "The statute seems to be in a form which ha
> become standard and has been enacted in many
> the states, the enactment of such legislation bei
> manifestly prompted by the universal urge to pr
> mote prosperity in agricultural pursuits. There h
> been much discussion of the plan in the decisions
> the courts of the various states where it has be
> adopted, and the general view expressed is that t
> statute should be liberally construed in order
> carry out the design in its broadest scope."

D. Penal provision necessary to protect contract.

The success of co-operative marketing depen
upon delivery of the crop to the association in accor
ance with the marketing contract. This makes the or
nary form of civil remedy inadequate to protect the
operative marketing system from disruption by brea
of contract. This fact has been recognized in numero
decisions in which the courts have explained the nec
sity for an extra remedy to make the contract upon wh
co-operative marketing is based effective.

A chain is no stronger than its weakest link.

Co-operative marketing is dependent upon a chain
contracts. Contract violation breaks the chain. Wh
the chain is broken the whole system of co-operation
in danger. The welfare of every member of the As
ciation depends upon his fellow member keeping his c
tract. The ordinary breach of a sales contract concer
only the seller and the buyer, but the breach of a
operative marketing contract effects the welfare of th
sands of farmers, and if sufficiently widespread, effe
the welfare of the entire state and all of its inhabita

Therefore, the courts have, without exception, s

tained the remedies provided by the Co-operative Marketing Act to enforce the performance of the contract.

In *Burley Tobacco Society* v. *Gillaspy* (1912), 51 Ind. App. 583, 100 N. E. 89, the court said:

> "The benefits of membership in the appellant society were, to a large extent, contingent upon the willingness of all to abide by the terms of their contracts. Every grower who joined in the agreement, and then violated the same by failure to deliver his product, necessarily increased the expenses of the other members, and made it more difficult for the agent to accomplish the purpose of the pool and obtain a fair and adequate price for the pooled tobacco. In such a case, the damages would be difficult of ascertainment, and could not be measured by any exact standard."

In *Arkansas Cotton Growers Co-operative Association* v. *Brown* (1925) Ark, 275 S. W. 46, the court said:

> "The only remedy at law would be a suit to recover damages, but this remedy is inadequate for the reason that the recovery of damages for a failure to deliver cotton would not repair the injury done if a substantial number of the members should refuse to deliver cotton. This would thwart the whole scheme and render it abortive. In that event the amount of damages recovered and distributed among the persistent members would not compensate for the loss caused by the failure to obtain the better price which it is expected will result from co-operative marketing."

In *Harrell* v. *Cane Growers Co-operative Association* (1925), Ga., 126 S. E. 531, the court said:

> "When the purposes of the act, as stated in the caption, are considered, it will readily appear that a recovery of damages for a breach of the contract entered into between the plaintiff and defendant in this case would so completely fail to furnish relief, in case there was a breach of the contract to deliver produce, that the whole object for which the association was formed would be defeated. Compensa-

tion in damages could not be made, because the injury is of such nature that the computation is impossible. The plan upon which the association is conducted makes its success depend, not upon the making of money for the association, but upon having such influence on the market price of the article which the defendant and other cane growers produced as would be beneficial to the producers within the association and enable each and every one of them to obtain a fair market price."

In *Kansas Wheat Growers Association* v. *Schulte* (1923), 113 Kan. 672, 216 P. 311, the Supreme Court of Kansas, in explaining the necessity for equitable relief, said:

"This association was organized for the sole purpose of marketing the wheat raised by its members, and performing such functions as are incidental thereto. From the very nature of things it must have the wheat or it cannot exist. It has no power to buy wheat; hence it cannot go into the open market and purchase wheat to fill its contracts of sale, if the members fail to deliver, and thus sustain its existence or recoup its loss. Even the payment of damages of 25 cents per bushel stipulated to be paid by a member for each bushel he produces and sells elsewhere would not sustain the association and enable it to do the business for which it is incorporated. Hence, as a practical matter, it is of little consequence that the member is solvent and able to respond in damages. If the association received damages from all, or a substantial portion, of its members, it would cease as a going concern, or be so seriously handicapped as to destroy its usefulness. Wheat is the only commodity the association can use as a going concern. All it can do with money is to pay its expenses and disburse the balance among its members. It necessarily follows that there is no adequate remedy at law."

Manchester Dairy System, Inc. v. *Hayward* (1926), N. H., 132 Atl. 12, contains an excellent statement of

what happens when a breach in a co-operative marketing contract occurs. The court said at page 15:

> "The fact that milk was obtainable in the open market is immaterial, since by the terms of the contracts with its members the association could not purchase. As shortages could not be supplied from non-members, the fulfillment of member contracts was essential to the fulfillment of the contracts of the association. It must be assumed that the work of organization and preparation had been performed, and that obligations of the character indicated had been incurred, on the faith and expectation of receiving the products of the members in compliance with their contracts.
>
> "Judgment for the loss of the profits which would have accrued to the association solely from the resale of the products withheld by a breaching member would not necessarily measure the damages to the association. If one member may breach his contract with impunity, so might others. With each withdrawal a larger proportionate share of the expenses would fall upon the remaining members. It would be impossible to compute the losses which would thus progressively accrue to the association and its remaining members; nor would this diminution of the proportionate returns, if they could be computed, measure the full extent of the wrong to the association. The influence of the conduct of the breaching member would inevitably tend to promote further withdrawals and impair the ability of the association to secure new members. If indulged in by a sufficient number, it would impair the effective existence of the association, if, in fact, it did not bring about a dissolution."

In *Oregon Growers Co-operative Association* v. *Lentz, et al.* (1923), 173 Or. 571, 212 P. 811, the court said:

> "These contracts are all similar in terms and constitute the association as the agent of the members to dispose of and market their products for the mutual benefit of the members and without profit to the association. Its success, therefore, and the benefits to be derived by the members thereof, is wholly

dependent upon the performance, by all of the con tracting parties, with the terms and conditions o their respective contracts. In order to carry out th objects and purposes for which it was organized, i is necessary for the association to enter into con tracts for the disposal of the products of its mem bers. Before it can safely make such contracts, i must be assured that it will obtain the products con tracted for. It must also be able to form a reason able estimate, in advance, of the amount of product which will be grown on the acreage stipulated, and maintain a sufficient organization and force to pre pare the same for market. It is also necessary t secure the capital or credit required to discharge it obligations to the growers and to conduct and carry on its business. The perishable nature of the prod ucts handled, the uncertainty of the market condi tions and prices, its inability to buy these product from non-members, and the limited time in which it business for each season must be conducted and com pleted, makes it essential that each member of th association should perform his contract according to its terms."

Like language is used by the courts in:

Tobacco Growers Co-operative Association v *Jones* (1923), 185 N. C. 265, 117 S. E. 174, a 117 S. E. page 178.

Texas Farm Bureau Cotton Association v *Stoval* (1923), 113 Tex. 273, 253 S. W. 1101 at 253 S. W. page 1108.

Minnesota Wheat Growers Co-operative Asso ciation v. *Huggins* (1925), 162 Minn. 471, 20 N. W. 420, at 203 N. W. page 426.

Northern Wisconsin Co-operative Tobacco Poo v. *Bekkedal, et al.* (1923), 182 Wis. 571, 19 N. W. 936, at 197 N. W. page 940.

Tobacco Growers Co-operative Association v *Danville Warehouse Co.* 132 S. E. 482, at page 486.

Liberty Warehouse Co. v. *Burley Tobacco Growers Co-operative Association* (1925), 208 Ky. 643, 271 S. W. 695, at 271 S. W. page 698.

In *Owen County Burley Tobacco Society* v. *Brumback* (1908), 128 Ky. 137, 107 S. W. 710, the court said:

> "The life and usefulness of the Society depends entirely upon the fidelity of the members in observing the agreement, and their failure to comply with it would necessarily work a dissolution of the Society, and consequently have the effect of depriving the members of the benefits and advantages they might expect to derive from its existence."

In *Dark Tobacco Growers Co-operative Association* v. *Dunn* (1924), 150 Tenn. 612, 266 S. W. 308, the court explained why the damage to a co-operative association from a breach of contract by a member cannot be computed. The court said:

> "The complainant could not do business without tobacco. When it contracts to sell, it must fill its contracts with tobacco delivered by its members. It cannot replace defendant's tobacco by purchasing upon the open market. Its charter prohibits it from so doing. For each pound of tobacco which is not delivered to the association by a member, there is a pro rata increase in the operating costs of the association; and that increase cannot be estimated in terms of money with definite exactness. For every defection of one member, there is a certain amount of dissatisfaction engendered among other members; indeed, other members are encouraged not to deliver their tobacco, and the normal increase of the association's members is prevented. All of these things result in damage, but the amount of damage cannot possibly be computed."

In *Dark Tobacco Growers Co-operative Association* v. *Mason* (1924), 150 Tenn. 228, 263 S. W. 60, the court said:

> "Since the Association is not permitted to handle the products of non-members, it was necessary to

make a special provision for the enforcement of these contracts."

Little need be added to what has been said by the courts concerning the necessity for safeguarding the co-operative marketing contract against voluntary breach by a member and against induced breach by an outsider. Obviously the most effective manner of upholding the contract and preventing outsiders from deliberately inducing members to violate their contracts, and thus break down co-operative marketing, is by penalizing the deliberate and conscious attempt to induce a member to break his contract. Liquidated Damages—although inadequate—furnish some remedy when a member breaches his contract; but even that remedy is unavailable against an outsider who causes the breach. The actual Damages cannot be determined in view of the co-operative character of the Association. Hence while injunction may stop a threatened breach not accomplished, for an accomplished breach, the Association would have no remedy against an outsider who wrongfully induced it—except for the penalty which it is permitted to recover under Sections 26 and 27.

The legislation under consideration directed against the malicious interference with contract relations simply puts teeth into the common law which has always condemned such unlawful interference with contracts, and grants a remedy to the damaged Association and which would otherwise be without redress.

E. Section 27 intended to stop deliberate and malicious interference with contract relations.

There is no longer any question that it is an actionable tort for an outsider to deliberately and malliciously interfere with the contract relations of other parties.

Nor is there any question that malice in this connection does not require personal ill-will or hatred but means deliberately and willfully inducing a breach of contract of which the wrongdoer has knowledge.

The plaintiff in error is admittedly guilty of deliberately and maliciously inducing a breach of contract for the double purpose of (1) injuring the co-operative association and (2) obtaining a profit for itself.

There is nowhere any denial that the Liberty Warehouse Company "*knowingly persuaded*" (R. 3) Mike Kielman, a member of the co-operative, to break his marketing contract with the co-operative association. There is nowhere any denial that the Liberty Warehouse Company accepted and received Kielman's tobacco and sold the same on its auction floor *after* its manager, C. M. Jones, had received a formal notice that Kielman's tobacco had been contracted to the Burley Tobacco Growers Co-operative Association and rightfully belonged to that Association. (R. 2 and 3.)

Notwithstanding the written notice delivered to the Liberty Warehouse Company advising that Company of the prior contract between Kielman and the co-operative association and notwithstanding the penal provisions of the Co-operative Marketing Law were specifically called to the attention of the Warehouse Company, it knowingly persuaded Kielman to break his contract, accepted his tobacco and sold it in violation of law.

By so doing the Warehouse Company made a profit for itself.

By so doing, the Warehouse Company actively aided, and abetted and conspired with Kielman to bring about a breach of his co-operative marketing contract and thereby damaged the co-operative association to an extent which it is difficult to calculate in money.

By so doing the Warehouse Company knowingly and intentionally violated the law of Kentucky.

Under these circumstances there is no doubt of the power of the Legislature to provide redress for the wrong done to the co-operative association and to penalize the malicious and tortious conduct of the Warehouse Company.

From the earliest times the Legislature has exercised the power to punish those who maliciously induce workmen or servants to break their contracts and assist them in doing so. *Ordinance of Laborers* (1349) 23 Edw. III.

Ever since *Lumley* v. *Gye* (1853) 2 El. & Bl. 216, it has been held a tort to wrongfully induce a breach of ordinary contracts as well as to induce a breach of contracts of service.

Bowen v. *Hall* (1881) 6 Q. B. D. 333.
Temperton v. *Russell* (1893) 1 Q. B. 719.

This court applied the rule to contracts generally in *Angle* v. *Chicago, St. P. & Minneapolis & Omaha Rlwy. Co.* (1893) 151 U. S. 1, 38 L. ed. 55, in which the Railroad Company was held liable for bringing about a breach of contract between another railroad and a contractor for its construction. In the opinion, the court reviewed the cases and said at page 13:

> "It has been repeatedly held that, if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the party injured can maintain an action against the wrongdoer."

The *Angle* case has been repeatedly followed.

In *Bitterman* v. *Louisville & Nashville Ry. Co.* (1907) 207 U. S. 205, 52 L. ed. 171, the court upheld an injunction against ticket scalpers who induced railroad pas-

sengers to break their contract with the railroad and dispose of the return trip ticket through such brokers. The court refers to the *Angle case, supra:*

> " • • • where it was held that an actionable wrong is committed by one 'who maliciously interferes in a contract between two parties and induces one of them to break that contract to the injury of the other.' That this principle embraces a case like the present, that is, the carrying on of the business of purchasing and selling nontransferable reduced-rate railroad tickets for profit, to the injury of the railroad company issuing such tickets, is, we think, clear. It is not necessary that the ingredient of actual malice, in the sense of personal ill will, should exist to bring this controversy within the doctrine of the Angle Case. The wanton disregard of the rights of a carrier, causing injury to it, which the business of purchasing and selling nontransferable reduced-rate tickets of necessity involved, constitute legal malice within the doctrine of the Angle Case."

The court referred to the fact that statutes had been passed penalizing ticket brokers for inducing breaches of contract by passengers and that such legislation had been uniformly sustained, citing:

Kinner v. *Lake Shore & M. S. R. Co.* 69 Ohio St. 339, 69 N. E. 614.

Schubach v. *McDonald*, 179 Mo. 163, 65 L. R. A. 136.

Samuelson v. *State*, 116 Tenn. 470.

Another recent condemnation of the wrong of inducing a breach of contract is found in *Hitchman Coal and Coke Co.* v. *Mitchell*, 245 U. S. 229 (1917), 62 L. ed. 260. In that case the union was enjoined from wrongfully inducing employees to break their contract of employment. In the opinion, the court said, at page 257:

> "In any aspect of the matter, it cannot be said that defendants were pursuing their object by *law-*

ful means. The question of their intentions—of their bona fides—cannot be ignored. It enters into the question of malice. As Bowen, L. J., justly said, in the Mogul S. S. Case, L. R. 23 Q. B. Div. 613: 'Intentionally to do that which is calculated in the ordinary course of events to damage, and which does, in fact, damage another in that other person's property or trade, is actionable if done without just cause or excuse.' And the intentional infliction of such damage upon another, without justification or excuse, is malicious in law. • • • And we cannot deem the proffered excuse to be a '*just* cause or excuse,' where it is based, as in this case, upon an assertion of conflicting rights that are sought to be attained by unfair methods, and *for the very purpose of interfering with plaintiff's rights, of which defendants have full notice.*

"Another fundamental error in defendants' position consists in the assumption that all measures that may be resorted to are lawful if they are 'peaceable'—that is, if they stop short of physical violence, or coercion through fear of it. In our opinion, any violation of plaintiff's legal rights contrived by defendants for the purpose of inflicting damage, or having that as its necessary effect, is as plainly inhibited by the law as if it involved a breach of the peace. *A combination to procure concerted breaches of contract by plaintiff's employees constitutes such a violation.*"

The various applications and citations of the *Angle* case are too numerous to include here, but are collected in an extensive note in 16 *Rose's Notes* 727; *and in the Supplement Vol.* 3, *p.* 387.

In *Westinghouse Elec. & Mfg. Co.* v. *Diamond State Fiber Co.* (1920) 268 Fed. 121, it was held that competition did not justify a party in inducing another to break his contracts. The court said at page 123:

"It would serve no useful purpose to repeat here the history of the doctrine of liability for inducing a breach of contract. Such history is recorded and the development of the doctrine shown in Nims on

Unfair Business Competition, c. XIII, pp. 347-387; Elliott on Contracts, vol. 3, §§ 2685-2703; 15 R. C. L. 52-64. The principle of law now obtaining both in this country and in England may be stated to be that a person who induces a party to a contract to break it, intending thereby to injure another person, or to get a benefit for himself, commits an actionable wrong unless there is sufficient justification for the interference."

The entire subject is ably reviewed in a special article n the subject of "Interference" with contract relations 15 R. C. L. 41, from which we quote as follows:

"In a number of jurisdictions statutes have been enacted making it a penal offense for one person to interfere with the contractual relations subsisting between employer and employee. *Bourlier* v. *Macauley*, 91 Ky. 135; *Thacker Coal Co.* v. *Burke*, 59 W. Va. 353. * * * there is no distinction in principle between enticing away the plaintiff's servant and inducing a third person to break any other contract between him and the plaintiff. In them therefore obtains the broad principle approved in England that a person who induces a party to a contract to break it, intending thereby to injure another person or to get a benefit for himself, commits an actionable wrong unless there is sufficient justification for the interference. The theory of this doctrine is that a party to a contract has a property right therein which a third person has no more right maliciously to deprive him of, or injure him in, than he would to injure his property real or personal, and that therefore such an injury amounts to a tort for which the injured party may seek compensation by an action in tort for damages. Under such circumstances to say that the injured party has his remedy against the other contracting party is in many cases offering a mere shadow for substance, for oftentimes the other party to the contract may be financially irresponsible. The contractual relation of master and servant is still that with reference to which the rule here considered is most frequently invoked. Among the many instances of other contracts which have been held to

come within the rule may be noted contracts for the construction of railroads, a contract between a laundry agent and laundries, an agency for the sale of goods, and generally contracts for the sale, purchase, or transportation of goods."

Upon the subject of malice, the rule is stated as follows:

> "Malice as here used, however, means merely the intentional doing of a wrongful act without legal justification or excuse, or, in other words, the willful violation of a known right. To break a contract is wrongful, and, *when a third person, with* knowledge of the contract, without legal excuse therefor, *induces a party thereto to breach the same, his act is said to be malicious.*"

And it is said that the right of competition "does not, according to the better opinion, justify one in inducing another to break his contract with a third person." (15 R. C. L. 60.)

The general rule is stated in 38 *Cyc., at page* 508, as follows:

> "The modern tendency is strongly toward the view that contract rights are property, that, as such, they are entitled to protection, and that malicious interference therewith gives a cause of action, although the methods employed are not inherently unlawful. It has been said 'that where the party has entered into a contract with another to do or not to do a particular act or acts, he has as clear a right to its performance as he has to his property, either real or personal, and that knowingly to induce the other party to violate it is as distinct a wrong as it is to injure or destroy his property. It is not a sufficient answer to say that he has a remedy against the party who has broken the contract.' 'There is no distinction between a defendant's enticing away the plaintiff's servant and a defendant's inducing a third person to break any other contract between him and the plaintiff.' This has been applied to contracts for the sale of land and of personalty. Where plaintiff collects and distributes in-

formation to its subscribers who agree not to make the same public, an injunction will issue against third parties who induce the subscribers to communicate such information in violation of their agreement. Where a railroad company issues tickets at a special rate under an agreement by which the purchaser contracts not to transfer them, it has been held an actionable wrong to induce the purchaser to break his contract and to sell the tickets to defendant." (Citing) *Mahoney v. Roberts*, 86 Ark. 130, 110 S. W. 225; *Knickerbocker Ice Co. v. Gardiner Dairy Co.* 107 Md. 556, 69 Atl. 405, 16 L. R. A. N. S. 746; *Wheeler Stenzel Co. v. American Window Glass Co.* 202 Mass. 471, 89 N. E. 28; *Garst v. Charles*, 187 Mass. 144, 72 N. E. 839; *Tubular Rivet, etc., Co. v. Exeter Boot, etc., Co.* 159 Fed. 824, 86 C. C. A. 648; *Wells, etc., Co. v. Abraham*, 146 Fed. 190 (affirmed in 149 Fed. 408, 79 C. C. A. 228); *Sperry, etc., Co. v. Mechanics' Clothing Co.* 128 Fed. 800; *Heaton-Peninsular Button-Fastener Co. v. Dick*, 55 Fed. 23, 52 Fed. 667.

In *Northern Wisconsin Co-operative Tobacco Pool* v. *kkedal et al.* 983 Wis. 571, 197 N. W. 936, an action s brought by the co-operative association to stop the kkedals from attempting to induce members of the operative association to sell their tobacco to the Bekdals contrary to their marketing agreement. The rt granted the relief prayed for and said:

"We consider the law well settled that one who maliciously induces another to breach a contract with a third person is liable to such third person for the damages resulting from such breach. *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840; *Knickerbocker Ice Co. v. Gardiner Dairy Co.* 107 Md. 556, 69 Atl. 405, 16 L. R. A. N. S. 746, and note; *Wheeler Stenzel Co. v. American Window Glass Co.* 202 Mass. 471, 89 N. E. 28, L. R. A. 1915F, 1076, and note; *Swain v. Johnson*, 151 N. C. 93, 65 S. E. 619, 28 L. R. A. (N. S.) 615, and note; 36 Har. Law Rev. 663.

"Appellants concede the doctrine that, where one knowingly induces the servant or employee of an-

other to breach his contract of employment, or where the interference of a third person is from malicious motives, or by the employment of methods not regarded by the law as proper, the party so offending must respond in damages."

The English and American cases are thoroughly reviewed in *R. and W. Hat Shop* v. *Scully* (1922) 98 Conn. 1, 118 Atl. 55, 29 A. L. R. 551. Reference is also made to annotations collecting the cases in the notes to *Thacker Coal & Coke Co.* v. *Burke* (1906) W. Va. 53 S. E. 161; in 5 L. R. A. n. s. 1091; and *Beckman* v. *Marsters* (1907) Mass. 80 N. E. 817 at 11 L. R. A. n. s. 202; and *Sucain* v. *Johnson*, 151 N. C. 93; in 28 L. R. A. n. s. 615.

There is a close analogy between the wrongful interference with contract relations and the actions of third persons in interfering with a trust relationship, so ably treated in a discussion of "*The Rights of the Cestui Que Trust*" by Mr. Justice Stone in 17 *Columbia Law Review*, 113 (June 1917), in which the learned author concludes that the *cestui* acquires rights *in personam* against third persons not because he is the equitable owner of the trust *res* "but through equity's imposing upon third persons, obligations *in personam*, because of their unconscientious interference with the right which the *cestui* has against the trustee; that, therefore, equity imposes on all the world the duty of not consciously aiding in a breach of trust or preventing the *cestui* from having the benefit of the obligation of the trustee." (p. 146.)

There is little difference in principle between receiving stolen goods with knowledge that they are stolen and aiding an individual to sell such goods and in accepting tobacco with knowledge that it has been sold under prior contract to another and in inducing the pos-

sessor of the property to break his contract and to place his goods beyond the reach of the true owner.

In discussing the subject "*Inducing Breach of Contract*" in 36 *Harvard Law Review* 663, Professor Sayre says:

> "If the true basis of the tort is the policy of the law to prevent the stealing promised advantages, the necessary motive—or, in the language of the books, the requisite 'malice'—must be the conscious intention to appropriate for oneself that which by law belongs to another, something akin to the *animus furandi* of a thief." (p. 679.)

We submit that the Legislature had a clear right to prohibit outside interests from wrongfully inducing a breach of co-operative contracts.

It had an equal right to make this prohibition effective by providing an adequate penalty. Such legislation conforms to the common law.

For the induced breach of a co-operative contract, damages are not an effective or practicable remedy; as it is almost impossible to determine the damage.

Hence, it was necessary to grant the co-operative a remedy by statute which would reasonably redress and prevent the wrong uniformly condemned by the accepted principles of law and equity.

F. Section 27 is a reasonable regulation of a business and an activity impressed with a public interest, to wit: (1), the warehouse business; and, (2), public auctions.

From the earliest Colonial days, it has been found necessary to regulate leaf tobacco warehouses and public auctions.

The public has an interest in the proper regulation of the warehouse business in which the chief agricultural products of the state are stored and in the successful

marketing of such products. It would have been a lack of wisdom upon the part of the Legislature to have provided a marketing system for tobacco and other agricultural products without regulating the chief prevailing factor in the existing system of marketing, namely, the loose leaf auction method of marketing.

It was obvious that in providing a new marketing system for the benefit of the tobacco growers of Kentucky that that system would be fought by those who had a pecuniary interest in maintaining the system theretofore prevailing. It was apparent that the proprietors of loose leaf auction warehouses would endeavor to dissuade farmers from carrying out their co-operative marketing contracts and would assist them in disposing of their tobacco outside the co-operative association and over the auction floor.

It was therefore necessary to impose regulations upon the warehouse business and the auctioning of tobacco therein, which would prevent such warehousemen from selling or auctioning tobacco which had been pledged to a co-operative marketing association and to penalize a breach of such regulations.

It is the purpose of this division of our brief to show that the regulation of the warehouse and auction business contained in *Section 27* of the *Bingham Co-operative Marketing Act* falls within the long recognized right of the Legislature to regulate a business impressed with a public interest.

(1) *Leaf tobacco warehouses are subject to regulation.*

In *Parnell v. Louisville Tobacco Warehouse Co.* (1922), 113 Ky. 630, 632, 23 Ky. L. Rep. 2423, the court upheld a rate-fixing statute, and said at page 632:

"From the foundation of the State the Legisla-

ture has exercised the power of control over the selling of tobacco in public warehouses, which, from the beginning has been one of the staple crops. While the State was yet a part of Virginia, during the Revolutionary War, regulations on this subject were prescribed. Similar acts were passed in this State soon after its creation, and have from time to time been amended."

In *Reaves Warehouse Corporation* v. *Commonwealth of Virginia* (1925) Va., 126 S. E. 87, No. 60, *October Term, 1926, Supreme Court of the United States*, Petition in error dismissed by plaintiff in error April 26, 1926), the Supreme Court of Appeals of Virginia upheld the so-called true name statute of that state requiring every loose leaf warehouseman offering tobacco for sale at public auction to place a tag or ticket on the tobacco with the true name of the owner thereon and also to keep proper records showing the true names of the owners of all tobacco sold by him. That case was carried to this court by the Reaves Warehouse Corporation, but the case was dismissed by plaintiff in error before argument. In the course of its opinion in that case, the court said:

"It appears that from early Colonial days until now statutes regulating the sale of tobacco have been enacted in the tobacco-growing states, and their validity has generally been accepted. *Gray* v. *Central Warehouse Co.* 181 N. C. 166, 106 S. E. 657; *Tobacco Co-op. Ass'n* v. *Jones*, 185 N. C. 265, 117 S. E. 174, 33 A. L. R. 234."

* * * * *

"That public warehouses are affected with a public interest, and hence subject to regulation, has not been seriously questioned here since the decision of *Munn* v. *Illinois*, 94 U. S. 113, 24 L. ed. 77, nor in England since 1810, when it was so held in *Allnut* v. *Inglis*, 12 East, 527. The doctrine was there attributed to Lord Hale. *Nash* v. *Page*, 80 Ky. 539, 4 Ky. Law Rep. 477, 44 Am. Rep. 490; *Budd* v. *New*

York, 143 U. S. 517, 12 S. Ct. 468, 36 L. ed. 247; *Brass* v. *North Dakota*, 153 U. S. 391, 14 S. Ct. 857, 38 L. ed. 757.

"Because tobacco warehouses are so affected by this public use, the statutes of Virginia have for many years provided for inspection, weighing, fees to be charged, monthly reports to the Commissioner of Agriculture, and many other details, Code, ch. 58, §§ 1348-1399. Being so impressed with a public interest, they may be regulated under the police power."

The court also discusses the question of classification and in this connection says:

"This statute does apply throughout the state and to all persons and property within the specified class, namely, to all growers and dealers in leaf tobacco, to all tobacco warehouses and to all associations, organized for the marketing of such tobacco. It could not intelligently or appropriately be applied to any others, because no others are within that general classification.

* * * * *

"We conclude, then, that these clear definitions show that the act here attacked is general, not special; that the classification is neither arbitrary nor unreasonable; and we are sure that it is supported by the principles which have been stated."

In concluding its opinion, the court well said:

"The conclusions here stated are based upon sound reason, and are consistent with well-established principles, among which are that public warehouses are affected with a public interest; that a classification based upon reason is valid; and that statutes for the promotion of the general welfare, including those for the prevention of fraud, are within the police power. Numerous decisions of the Supreme Court of the United States, a few of which have been cited, establish and enforce these principles."

The Virginia decisions are important here because Kentucky was at one time part of the Colony of Virginia.

In *Glass* v. *Davis* (1873), 23 Grattan (64 Va.) 184, the Virginia court upheld a provision of law with respect to the inspection of tobacco and said, at page 196:

> "It (tobacco) was long used as the currency of the country, in which public and private debts were contracted and paid. There is no subject upon which there has been more legislation in the Colony and the State of Virginia than the subject of tobacco."

In *Gray* v. *Central Warehouse Co.* (1921), 181 N. C. 166, 106 S. E. 657, Clark, C. J., said at page 171:

> "Indeed, as far back as the history of the State extends the business of tobacco warehouses has been, if not a public duty, it has always been 'affected with a public use.' The laws of North Carolina from 1669 to 1790 have been compiled as State records, volumes 23, 24 and 25, by the writer of this opinion, and in the index thereto, in the last named volume, it appears that no less than 75 statutes were enacted prior to 1790 in regard to tobacco warehouses requiring inspection, regulation, and fixing charges in such business. To the fullest extent, therefore, their regulation and control by the public has been recognized and enforced in this State."

For examples of the extent of legislation regulating the inspection, tagging, planting, sale, and warehousing of tobacco and the keeping of records, reference is made to *Hennings Statutes at Large*, Vol. 1, carrying the Virginia Statutes of the year 1619. The index of the tobacco statutes covers a page and a half.

In *Leigh's Revised Code of* 1819, Vol. 2, tobacco legislation consumes 42 pages. See present *Statutes of Virginia, Code of* 1919, Sections 1358, 1393 and 1394; 1348 to 1399, covering accounts of sales, reports to the Commissioner of Agriculture, the establishment of warehouses, samplers, weighing, receipts, books, fees, place and manner of storage, insurance and license.

The business of dealing in leaf tobacco has also been

subject to the closest regulation by the United States Government for more than half a century and the present laws of the United States classify dealers in leaf tobacco so as to include warehousemen selling such tobacco and provide for the manner in which the books of such companies shall be kept; reports to be made by such dealers and for taxes to be paid. See Chapter 6, *U. S. Comp. Stat.* 1918, entitled *Tobacco and Snuff*, §§ 6192 to 6196, inclusive and *Supp. of* 1925, §§ 6168 to 6204d, inclusive. For the prior history of the above sections, see 4 *Fed. Stat. Ann. 2d Ed.* 136, under the title *Tobacco and Snuff*.

Legislation prohibiting warehouses from aiding contract breakers to dispose of their tobacco contrary to law does not differ from other legislation establishing the conditions under which the business of conducting public warehouses and auctions may be carried on.

The right of the state to regulate warehouses handling basic agricultural products was finally settled by the decision of this court in *Munn* v. *People of Ill.* (1877) 94 U. S. 113, 24 L. ed. 77. That case is so well known that we merely quote the following brief statement as a reminder of the principles upon which the power to regulate warehouses rests. Judge Waite said, at page 126:

> "Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

The *Munn* case was followed in *Budd* v. *New York* (1892), 143 U. S. 517, 36 L. ed. 247, affirming the deci-

sion of the New York Court of Appeals (117 N. Y. 1) and holding a statute of that state regulating the fees of grain elevators constitutional. The following language from the opinion of this court in *Budd* v. *New York* is directly applicable here. At page 540, the court said:

> "*The Court of Appeals of Kentucky, in* 1882, *in Nash* v. *Page*, 80 *Ky.* 539, 545, *cited Munn* v. *Illinois, as applicable to the case of the proprietors of tobacco warehouses in the city of Louisville, and held that the character of the business of the tobacco warehousemen was that of a public employment, such as made them subject, in their charges and their mode of conducting business, to legislative regulation and control, as having a practical monopoly of the sales of tobacco at auction.*" (Italics ours.)

Brass v. *North Dakota* (1894), 153 U. S. 391, 38 L. ed. 757. The act sustained in that case required the warehouseman to insure the grain of others at his own expense. This court answered an objection to that provision of the law at page 404 by saying:

> "This may be burdensome, but it affects alike all engaged in the business, and, if it be regarded as contrary to sound public policy, those affected must instruct their representatives in General Assembly met to provide a remedy."

Subsequently, in *Cargill Co.* v. *Minnesota ex rel. Railroad and Warehouse Commission* (1901), 180 U. S. 452, 45 L. ed. 619, the court sustained a Minnesota act which applied only to warehouses situated on the right of way of any railroad and did not apply to warehouses differently situated.

Munn v. *Illinois* has been so widely quoted that we content ourselves by referring to the exceptionally discriminating annotation of this case in 9 *Rose's Notes*, beginning at page 510, and particularly under the head-note at page 519, reading:

> "When the owner of property devotes it to a use

in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created."

The author refers to *Nash* v. *Page*, above, as throwing an interesting light upon the proposition that the right of public regulation exists, although no special privilege or franchise has been conferred. He says (9 *Rose's Notes*, page 519):

"That case was concerned with the right to regulate tobacco warehouses, and asserts the right as settled 'long before the rule established in the case of *Munn* v. *Illinois*' (*Nash* v. *Page*, 80 Ky. 547, 44 Am. Rep. 495). Reference to the statutes of that State discloses the fact that as long ago as 1798, it was enacted that the rent charged in tobacco warehouses should be 'three shillings for every hogshead of tobacco that shall be received, inspected and delivered,' while all tobacco stored more than twelve months should be charged 'at the rate of three pence per month for each hogshead' (Littell & Swigert Digest of Laws of Kentucky, index under 'Tobacco'). The digests do not show that this legislation—which, in a modified form, is apparently still on the statute books—has ever been passed upon by the courts; nor does it seem ever to have been called to the attention of the Supreme Court in its discussions of the doctrine of *Munn* v. *Illinois*. The statutes and digests of the State reveal no special rights, privileges or immunities enjoyed by the warehousemen, and necessary under the more restricted view of the police power of the dissenting judges, to authorize public regulation; and manifestly it is a precedent directly in point to justify the Munn doctrine in its *precise* application. Public regulation of the great grain trade of the Northwest was imperatively necessary in the one case, *and of the great staple product of Kentucky in the other*. Of this latter, we learn that 'since the formation of the State government, the sale of this great staple has been fostered and protected by legislation'; (*Nash*

v. *Page*, 80 Ky. 542, 44 Am. Rep. 491; see *Louisville Tobacco Warehouse Co.* v. *Commonwealth* (Ky), 48 S. W. 425; s. c., on rehearing, 106 Ky. 173, 57 L. R. A. 33, 49 S. W. 1071). True, the validity of these statutory regulations does not appear to have been tested either in the State or national courts, yet the mere fact that the right of the General Assembly to regulate the rates of these warehouses went unchallenged is not without significance. It goes far toward establishing the view of the common law adopted by the majority of the court in the Munn case." (Italics ours.)

The author, after discussing the *Munn*, *Budd* and *Brass* cases, says, at page 533:

"The effect of these decisions is therefore to declare the business of handling and storing grain for hire a devotion of property to a public use, no matter where or under what circumstances that business may be conducted; and the courts have in several instances recognized this as the principal result of the rulings of the Supreme Court (*Delaware, etc. R. R. Co.* v. *Central Stockyards Co.* 45 N. J. Eq. 50, 6 L. R. A. 855, 17 Atl. 146; *Belcher Sugar Refining Co.* v. *St. Louis Grain Elevator Co.* 101 Mo. 192, 8 L. R. A. 801, 13 S. W. 822; *McCullough* v. *Brown*, 41 S. C. 247, 23 L. R. A. 421, 19 S. E. 472; *Stewart* v. *Great Northern Ry. Co.* 65 Minn. 517, 33 L. R. A. 429, 68 N. W. 209; *Rippe* v. *Backer*, 56 Minn. 108, 22 L. R. A. 859, 57 N. W. 331; *Vega S. S. Co.* v. *Consolidated Elevator Co.* 75 Minn. 312, 43 L. R. A. 844, 77 N. W. 974)."

Without attempting to list the cases which have sustained laws regulating institutions, businesses or activities clothed with a public interest in accordance with the principles announced in *Munn* v. *Illinois*, we refer to:

Calsinger v. *City of Atlanta* (1914), 142 Georgia, 555 (lodging-house business).

State, Public, etc. Comm. v. *Monarch Refrigerating Co.* (1915), 267 Ill. 528, 108 N. E. 716 (refrigeration and storage warehouses).

People v. *Steele* (1907), 231 Ill. 340, at 347 (theater business).

Merchants Exchange v. *Knott* (1908), 212 Mo. 616, at 643, 111 S. W. 565 (grain inspection).

Burlington v. *Beasley* (1877), 94 U. S. 310, at 314, 24 L. ed. 164 (grist mills).

State v. *Edwards* (1893), 86 Maine, 102, at 105, 29 Atl. 947 (grist mills).

Chicago Dock Co. v. *Garrity* (1885), 115 Ill. 155, 3 N. E. 448 (wharves).

New York, etc. Stock Exchange v. *Board of Trade* (1889), 127 Ill. 153, at 158, 19 N. E. 855 (market quotations).

The last case has recently been approved by this court in *Board of Trade of the City of Chicago* v. *Olsen* (1923), 262 U. S. 1, 67 L. ed. 839, at page 41, in which it was held that the Chicago Board of Trade "is engaged in a business affected with a public national interest and is subject to national regulation as such. Congress may, therefore, reasonably limit the rules governing its conduct with a view to preventing abuses and securing freedom from undue discrimination in its operation. The incidental effect which such reasonable rules may have, if any, in lowering the value of memberships, does not constitute a taking, but is only a reasonable regulation in the exercise of the police power of the national government."

The above language was used in discussing the provision of the *Grain Futures Act* (Sept. 21, 1922, Chap. 369, § 1, 42 Stat. 998), requiring the admission as board members of authorized representatives of "lawfully formed co-operative associations of producers" under conditions named in the Act. Chief Justice said of this section, at page 41:

"Congress evidently deems it helpful in the pres-

ervation of the vital function, which such a Board of Trade exercises in interstate commerce in grain, that producers and shippers should be given an opportunity to take part in the transactions in this world market through a chosen representative * * *. We think the objection to this feature of the Act untenable."

In the *Munn*, *Budd* and *Brass* cases, the warehouses concerned received and sold grain. The three States of Illinois, New York and North Dakota, involved in those cases, were grain states. But there is no distinction between the legal principles with respect to the regulation of warehouses handling grain and warehouses handling tobacco. There is as great a necessity in the tobacco states for the regulation of warehouses selling tobacco by public auction as there is in the grain producing states for the regulation of grain warehouses and elevators. The record and reports of the adjudicated cases in the tobacco marketing states and the reports of the Federal and State Departments of Agriculture abundantly show the vital interest which these states have in the marketing of the tobacco crop upon which a majority of the inhabitants of these states is more or less dependent.

This tobacco crop is at present marketed largely through the tobacco warehouses or the co-operative associations. Both of these institutions for the marketing of tobacco are brought under the regulation of law. The co-operative association is forbidden to deal in the products of non-members. On the other hand, the loose-leaf tobacco warehouse is prohibited from dealing in the tobacco of members of the co-operative association. There is no discrimination for or against the tobacco warehouse or the co-operative. Both are regulated by law and must conduct their business in compliance with the law.

There is an exact parallel between the public interest in the regulation of tobacco warehouses in the tobacco states and the interest of the public in the regulation of cotton gins and cotton warehouses in the cotton states. The authorities uniformly uphold legislation regulating cotton gins and cotton warehouses. See:

Tallahasse Oil Fertilizer Co. v. *Holloway* (1917), 220 Ala. 492.

Ex parte White (1915), 82 Tex. Crim. Rep. 85; 198 S. W. 583.

State ex rel. Lyon v. *State Warehouse Commission* (1912), 92 S. C. 81; 75 S. E. 392.

Park v. *Laurens Cotton Mills* (1907), 75 S. C. 560; 56 S. E. 234.

Oklahoma Gin Co. v. *State* (1916), 63 Okla. 10; P. U. R. 1916, c. 22, 158 Pac. 629.

Sims v. *State* (1921), 80 Okla. 254; 196 Pac. 132.

Bertig Bros. v. *Independent Gin Co.* (1920), 143 Ark. 347; 220 S. W. 669.

Davis v. *State* (1880), 68 Ala. 58.

State v. *Moore* (1889), 104 N. C. 714.

Jenkins v. *State* (1904), 119 Ga. 430; 46 S. E. 629.

State v. *Mullins* (1911), 87 S. C. 510; 70 S. E. 9.

We submit that the power of Kentucky to regulate the tobacco warehouse business rests upon long established practice and upon the clear right of the state to regulate a business impressed with a public interest.

Section 27 only penalizes warehousemen who solicit and persuade members of a co-operative association to break their contract and aid and assist in the breach by selling the tobacco previously pledged to the co-operative association.

Surely the plaintiff in error ought not be heard to

complain because the state has endeavored to prevent it from inducing third persons to break their contracts and from selling tobacco that such persons have no lawful right to sell. The Court of Appeals of Virginia well said in *Reaves Warehouse Corp.* v. *Commonwealth*, 126 S. E., at page 91:

> "The constitutional limitations, state and federal, are ordained for the preservation of substantial rights, *but they cannot be successfully invoked for the support of unethical business practices.*" (Italics ours.)

(2) *Public auctions are subject to public regulation.*

The petition charges and the answer admits that the plaintiff in error "conducts a loose-leaf auction tobacco warehouse in the City of Maysville, Mason County, Kentucky. As such warehousemen, it receives and sells at *auction* tobacco produced by growers of tobacco." (R. 2.)

Section 27 provides that any person conducting a warehouse who solicits a member of a co-operative association to break his contract and receives "such member's products for sale or for *auction*" shall be liable to the association in a civil suit for the penal sum of $500.00, etc. There is no doubt that the activity or business of selling agricultural products and merchandise by public auction, has been from the beginning of this Government, subject to governmental regulation and control.

The very definition of an auction implies public license and regulation. In 6 *Corpus Juris*, 820, under the title "*Auctions and Auctioneers*," an auction is defined as follows:

> "An auction is a public sale of property to the highest bidder by one licensed and authorized for that purpose."

In 6 *Corpus Juris*, page 822, it is said that the state in

the exercise of its police power may qualify or limit the right to be an auctioneer, and may regulate the conduct of auctioneers. In 2 *R. C. L.* 1119, it is said that the state may regulate public auctions, grant licenses and impose fees, and that statutes of this character are designed "not only for the purpose of raising revenue, but also to prevent mischief arising from unlicensed auctioneers who facilitate the disposal of stolen goods."

In *Biddles* v. *Enright* (1925), 239 N. Y. 354, 146 N. E. 625, the Court of Appeals upheld a law prohibiting public auctions in New York City at night, and said:

> "Then, again, the business of an auctioneer, while perfectly legal, has always been affected with a public interest and subject to legislative restriction. *People ex rel. Schuab* v. *Grant*, 126 N. Y. 473, 27 N. E. 964; General Business Law (Cons. Laws, Chapter 20), Article 3. By Section 34 of the Greater New York Charter, no person may carry on the business of auctioneer in the City of New York without first having obtained a license from the City Clerk. Certain requisites are necessary in order to procure this license. I take it that if the Legislature may prohibit the selling of goods at public auction, except through a licensed auctioneer, or prohibit a person acting as public auctioneer, unless he first obtained a license, that it may place such restrictions upon the obtaining of the license, or such limitation upon the acts of the auctioneer as may be reasonable—that is, not wholly arbitrary."

In *Carlton* v. *Watertown* (1924), 124 Misc. 244, 207 N. Y. Supp. 339, the court upheld an act requiring a sales book to be kept and signed by the purchaser of goods at an auction before any other goods were put up for sale; and used these pertinent words at page 342:

> "It has long been the settled law of this state, from colonial times down to the present, that the state, in the exercise of its police power, has authority to limit the right of the individual to sell his goods at auction, and to regulate the conduct of such

sales, and that statutes and ordinances adopted for that purpose, unless unreasonable and arbitrary, are valid. * * * The right to sell goods at public auction is not an absolute one, but rather is a special privilege, which can be withheld unless certain reasonable regulations are complied with. The evils attendant upon auction sales, and the opportunity of imposing upon and defrauding the public, are too well known to require discussion here. It is a matter which long experience has taught should be regulated. If the ordinance in question tends in some degree to prevent the evils and misdeeds so frequently connected with auction sales, and thus preserves and promotes public safety and welfare, it is constitutional and valid. * * * It is apparent that the ordinance does have a direct connection with public safety and welfare."

Without attempting to exhaust the cases, the following is a partial list of cases in which it has been held that the public auction business is clothed with a public interest and is subject to public regulation to prevent abuse or fraud:

California: *Ex parte Bruce* (1921), 54 Cal. App. 280, 201 Pac. 789.

Georgia: *Clein* v. *Atlanta* (1924), 159 Ga. 121, 124 S. E. 882.

Illinois: *Wiggins* v. *Chicago* (1873), 68 Ill. 372.

Indiana: *Goshen* v. *Kern* (1878), 63 Ind. 468, 30 Am. Rep. 234.

Louisiana: *Charity Hospital* v. *Richhart* (1916), 139 La. 446, 71 So. 735.

Maryland: *Gaither* v. *Jackson* (1925) Md. 128 Atl. 769; *Mogul* v. *Gaither* (1923), 142 Md. 380, 121 Atl. 32.

Michigan: *People* v. *Gibbs* (1915), 186 Mich. 127, 152 N. W. 1053, Ann. Cas. 1917B, 830.

MINNESOTA: *State ex rel. Cook* v. *Bates* (1907), 101 Minn. 301, 112 N. W. 67; *Village of Minneota* v. *Martin* (1914), 124 Minn. 498, 51 L. R. A. (N. S.) 40, 145 N. W. 383, Ann. Cas. 1915B, 812.

NEBRASKA: *Caldwell* v. *Lincoln* (1886), 19 Neb. 569, 27 N. W. 647.

NEW JERSEY: *Margolies* v. *Atlantic City* (1901), 67 N. J. L. 82, 50 Atl. 367.

NEW YORK: *Rochester* v. *Close* (1885), 35 Hun. 208; *Buffalo* v. *Marion* (1895), 13 Misc. 639, 34 N. Y. Supp. 945; *Robinson* v. *Wood* (1922), 119 Misc. 299, 196 N. Y. Supp. 209; *People ex rel. Schwab* v. *Grant* (1891), 126 N. Y. 473, 27 N. E. 964; *Alexander* v. *Enright* (1924), 211 App. Div. 146, 206 N. Y. Supp. 785.

NORTH CAROLINA: *State* v. *Razook* (1920), 179 N. C. 708, 103 S. E. 67.

VIRGINIA: *Roanoke* v. *Fisher* (1923), 137 Va. 75, 119 S. E. 259.

From *Foule* v. *The Common Council of Alexandria* (1830), 3 Peters, 398, 7 L. Ed. 719, it appears that as early as 1798 the General Assembly of Virginia passed an act empowering municipalities "to grant licenses to exercise, in such town, the trade or business of an auctioneer; provided that no such license should be granted until the person or persons requesting the same should enter into bond with one or more sufficient sureties" payable to the town in such penalty and with such condition as the laws of the town required.

Section 27 of the *Bingham Act* is an exercise of regulatory power over the auction business which has been exercised by government in England and America as far back as the records run. Auctioneers have always been subject to heavy penalties for selling goods which they

have no right to sell, or for failing to keep accurate, complete and true records of sales. *Section* 27 merely extends this principle to tobacco auctions and prohibits under penalty the sale of tobacco which has previously been pledged or sold to a co-operative marketing association by a member who was induced by an auctioneer or warehouseman to break his contract.

G. Sections 26 and 27 are a proper exercise of police power to prevent fraudulent and unlawful evasion or breach of contract.

This court has clearly decided that the police power may be exercised for the general well-being of the community and that it embraces regulations designed to promote the public convenience, the general prosperity, the public health, the public morals and the public peace and safety. *Bacon* v. *Walker* (1907), 204 U. S. 311, 51 L. Ed. 499.

Section 27 provides:

> "This section is enacted in order to prevent a recurrence or outbreak of violence, and to give marketing associations an adequate remedy in the Courts against those who encourage violation of co-operative contracts."

We have previously explained in the "Statement of Facts" the history of night-riding and violence in Kentucky which followed the failure of members of a prior pool to keep their contracts—in other words, to keep faith with their fellow members. See also Chapter 2, entitled "*From Night-Riding to Co-operation*" in "*Co-operative Marketing*," by Herman Steen.

With this past history before it and with a realization that the prior co-operative contracts had not been legally enforceable, the Kentucky legislature enacted Section 27

"to prevent a recurrence or outbreak of violence" by providing a remedy in the courts to stop the violation of co-operative contracts. When men have no remedies in the courts and they are fighting for their economic existence, some are apt to take the law into their own hands and violence ensues. Therefore, the legislature, in the exercise of its power to preserve public peace and public safety, granted these farmers who are fighting for their economic existence a civil remedy administered in judicial tribunals so that a resort to arms and self-help is unnecessary.

Public order is promoted when lawful obligations are performed; and it has always been recognized that laws passed to prevent the fraudulent evasion of contracts are within the police power of the state and nation.

The Co-operative Marketing Law grants the Association the right to an injunction to prevent a breach of contract and the right to compel specific performance. These remedies are futile if the tobacco or other agricultural product has already been sold, and as previously explained, the provision for liquidated damages is of little aid to the Association in an action against a member and does not apply in an action against an outsider who induces a contract breach.

The loose-leaf auction floor furnishes a quick method by which a member of a co-operative association can dispose of his tobacco and thereby defeat the claim of the Co-operative Association under its contract and evade the performance of his lawful obligations with respect, only to the Co-operative Association, but with respect to creditors who hold mortgage liens; landlords who hold landlords' liens; insurance companies; and others.

If the loose-leaf warehouse is free to auction off tobacco which a member has no lawful right to sell, it be-

comes an effective instrument to enable a fraud to be successfully accomplished. This has been carefully pointed out by the courts in the tobacco producing states.

We have previously referred to the decision in *Reaves Warehouse Corporation* v. *Commonwealth* (1925), ——— Va. ———, 126 S. E. 87 (Error Proceedings dismissed by plaintiff in error before argument in this court, No. 327, October term, 1925, U. S. Supreme Court). In that case the court upheld a statute of the State of Virginia which required every person who delivered leaf tobacco to a warehouseman to impart the true name of the owner of such tobacco and required the warehouseman to keep a record showing the delivery of such tobacco and the name of the owner. The Act also required warehousemen or co-operative associations to place on all leaf tobacco delivered to it for sale a ticket or card stating the name of the true owner, etc. The Act further provided that any warehouseman who bought or sold tobacco and who did not comply with the Act, or who sold the same under a fictitious name, should be guilty of a misdemeanor. Warehousemen were defined as persons "engaged in the business of selling leaf tobacco, for a commission or for any other consideration."

Section 8 of the *Virginia Act* provided:

> "The purpose of this Act is to prevent frauds in the handling and sale of leaf tobacco."

In discussing the question of fraud in connection with the sale of tobacco through the loose-leaf warehouse, the Virginia court said:

> "When one delivers tobacco to a warehouse for sale, and refuses to give his name, or gives a fictitious name, or refuses to disclose the facts required by the act, his purpose must be construed to be sinister, and there is a fair inference that he designs to accomplish some fraud upon his landlord, his cred-

itor, or some other to whom he is under obligation to deliver his tobacco.

"In the Motley Case it is shown that, knowing the producer of the tobacco, and having as a dealer bought it, the warehouseman placed a fictitious name, George Cox on it. • • •

"The statute was adopted to prevent fraud, and, if there had been a universal custom of warehousemen to indulge in such subterfuges whereby frauds were promoted, then it is manifest that the occasion had arisen for the state to intervene to prevent them. It is said by the learned counsel for the warehousemen that it is 'pertinent and proper for the court in this case to inquire into the true purpose of the act in question and ascertain whether it is a valid exercise of the police power of the state, or whether it is in reality "an arbitrary interference with private business," or whether it imposes "unusual and unnecessary restrictions" upon a lawful occupation, or "invades property rights."' Responding to these inquiries we have no doubt whatever that it is a valid exercise of the police power; that it is not an arbitrary interference with private business; indeed the statute recognizes and accommodates itself to the customary methods of such business; namely, the identification of the specific piles of tobacco by the name of the true owner. That this invades no property rights is apparent."

In the Reaves Case counsel for the warehousemen quoted an address of President Wilson to the effect that law was an umpire and must not go into the ring until one or the other opponent hits below the belt. In the opinion, which is one of the best examples of clear judicial writing of which we know, Judge Prentis answers this argument as follows:

"*Applying these expressions to the existing situation, is it not manifest that when the warehouseman actively aids the grower who is a contract breaker in the perpetration of a fraud either upon his fellow members and the association or upon any other, they do the very thing which is there condemned—that is, they conspire and hit below the belt? Is the law to*

be criticized when it condemns this as a 'fraudulent and dirty' blow? That it is the antithesis of manliness, sportmanship, righteousness and courtesy is obvious. This being shown, the occasion arose which required the law first to devise and then to enforce proper rules for that game. Certainly those rules, which ought not to need statutory expression because they are already sanctioned by the human conscience, need no defense. If there has been an accepted business rule under which warehousemen justify themselves in thus using fictitious names and in this way conspiring with contract breakers, to deceive and defraud others, the time has come when the State, in the exercise of its police power, should repeal that pernicious rule; and this is one, if not the chief purpose of the statute."

The same Act was adopted in Kentucky and is entitled *"An Act Regulating the Sale of Leaf Tobacco at Public Auction in this Commonwealth."* Chap. 10, Laws of 1924.

The constitutionality of the Kentucky Act was sustained in *Jewell Warehouse Co. et al.* v. *Kemper, et al.* (1925) 206 Ky. 267, 268 S. W. 224. In its opinion the Kentucky Court of Appeals said:

"For, however, a century Kentucky has by statutes regulated the business of warehousemen. * * * There is a clear distinction between the warehousemen who sell tobacco at public auction and those who negotiate private sales. That distinction has often been recognized.

"Our General Assembly has enacted and this court has sanctioned a license tax or occupational tax on auctioneers which necessarily means that those who sell at public auction have been separated into a class and constituted such in contradistinction to those who sell in private."

In *Kenton Loose Leaf Warehouse Co.* v. *Orie S. Ware*, No. 25591, Kenton Circuit Court, Kentucky, the court refused to enjoin the enforcement of the Kentucky Act requiring tobacco to be sold in the name of the true

owner. This case was taken to the Kentucky Court of Appeals and consolidated in that court with the *Jewell Tobacco Warehouse Co.* v. *Kemper, supra.* In his opinion the Circuit Judge referred to the following well-known facts with respect to the sale of tobacco:

> "The Court, of course, takes judicial cognizance of the fact that associations such as the Burley Tobacco Co-operative Association are authorized by law, that contracts pledging their tobacco to it for sale have been valid and enforceable, even to the extent of withdrawing such property pledged from the reach of creditors through the immediate remedies of judicial sales; that a violation of such contracts will be protected by injunction. It is shown, and without any contradiction, that in Kentucky there were 94,410 persons growing and having grown on their land tobacco, and that of this number 78,422 were members of the association and but 17,988 persons growing tobacco who were not members of the Association, and that the total number of members of the Association, which includes growers in Indiana, Kentucky, Ohio and West Virginia is over 100,000. It is shown by affidavits that a great many of the members of the association desiring to avoid their contracts with the Association would remove their tobacco to loose-leaf warehouses and sell their tobacco under assumed names, and collect the money, thus perpetrating a fraud upon the Association and the 100,000 members comprising it, without leaving any evidence whereby the defrauded party might detect the fraud. It is further shown that in a great many instances landlords having liens upon tobacco grown upon the place, or a part interest in the tobacco, were defrauded by the tenant secretly removing the tobacco to some warehouse and having it sold under an assumed name and pocketing the proceeds. It is further shown that persons desiring to perpetrate a fraud upon insurance companies frequently removed and sold tobacco through warehouses in assumed names, and then burned the barn and made claim for the loss of the tobacco thus removed and sold, and thus rendered their detection difficult. Certainly a statute

which has for its purpose the prevention of these frauds or renders the perpetrator of them capable of detection is within the police power."

All of this legislation, namely, the provisions of the Co-operative Marketing Act, the laws requiring that sales be made in the name of the true owner, the laws requiring recording of co-operative marketing contracts, etc., have a common purpose—to stop fraud and the evasion of legal obligations.

Such laws do not differ from laws regulating sales by warehousemen, auctioneers, junk-dealers, pawn-brokers, used automobile dealers, cotton buyers, etc., which have frequently been sustained as within the police power of the state.

The leading case upon the precise point here involved is *Rosenthal* v. *New York* (1912) 226 U. S. 260, 57 L. Ed. 213. In that case, Section 550 of the Penal Code of New York was attacked. This law required the dealers in junk, metal or second-hand articles to ascertain "by diligent inquiry that the person selling or delivering the same has a legal right to do so." The court sustained the law and in so doing said at page 269:

"It seems to us that the object of the legislation is well within the legitimate bounds of the police power of the state, and sustainable upon the principles discussed in *Mugler* v. *Kansas*, 123 U. S. 623, 661, 31 L. Ed. 205, 210, 8 Sup. Ct. Rep. 273, etc., of which more recent applications are to be found in *Booth* v. *Illinois*, 184 U. S. 425, 429, 46 L. Ed. 623, 626, 22 Sup. Ct. Rep. 425, and *Lemieux* v. *Young*, 211 U. S. 489, 53 L. Ed. 295, 29 Sup. Ct. Rep. 174. See also *Chicago, B. & Q. R. Co.* v. *McGuire*, 219 U. S. 549, 568, 55 L. Ed. 328, 338, 31 Sup. Ct. Rep. 259.

"Nor can the act in question be deemed to conflict with the 'equal protection' clause because it places junk-dealers, etc., in a class by themselves."

The court illustrates that an inquiry into the title of the seller of goods is proper; and in answer to the objection made in the New York case (also made here), that it is unlawful to require an inquiry or search of the title of the owner of property, Mr. Justice Pitney said, at page 269:

> "It is urged as a criticism that the statute directs the junk-dealer's inquiry to the question of the legal right of the seller to sell, rather than to the question of an original larceny. It ought to be unnecessary to say that if goods have in fact been stolen, a diligent inquiry into the right of the present possessor to make sale or delivery of them will very surely tend to disclose the larcenous origin of his title. Indirect questions in such a case will very probably bring out the truth as readily and as surely as the plump inquiry—'Did you steal these goods?' Or, at least, the legislature might so presume. For, of course, all such matters rest in legislative discretion."

The *Rosenthal* case is followed in: *Shurman* v. *Atlanta* (1918), 148 Ga. 1 at 12, 95 S. E. 698 at 702; *Louisiana* v. *Weinstein* (1917) 181 La. 1086, 76 So. 208; *Levi* v. *Annison* (1908), 155 Ala. 149.

For a complete collection of cases and a reference to statutes regulating junk-dealers, see Annotation on the subject in 30 *A. L. R.* 1427.

We submit that there is no distinction between the law prohibiting a junk-dealer from selling goods unless the person who delivers the same, "has a legal right to do so" and the law in this case which prohibits auction warehousemen from selling goods unless the farmer who delivers the same, has a legal right to do so. Another example of laws passed to protect creditors from fraud are the so-called Bulk Sales Laws which have been sustained by this court.

> *Lemieux* v. *Young* (1908), 211 U. S. 489; 29 S. Ct. 174, 53 L. Ed. 295.

Kidd, Dater & Price Co. v. *Musselman Grocery Co.* (1910), 217 U. S. 461, 30 S. Ct. 606, 54 L. Ed. 839.

Steele, etc. Co. v. *Miller* (1915), 92 O. S. 115, 110 N. E. 648, Ann. Cas. (1917) C. 926.

Statutes closely analogous to the law involved in this case have been adopted in the cotton-growing states to prevent fraud in the sale of cotton. *Parks* v. *Laurns' Cotton Mills* (1907), 75 S. C. 560, 56 S. E. 234; *State* v. *Moore* (1889), 104 N. C. 714, 10 S. E. 143.

See also *State of Minnesota ex rel. Beck* v. *Wagener* (1899), 77 Minn. 483, 80 N. W. 633, in which law regulating commission merchants engaged in the sale of agricultural products was sustained and *People* v. *Beakes Dairy Co.* (1918), 222 N. Y. 416, 119 N. E. 150, which upheld an act requiring milk gathering stations to obtain a license and to give a bond.

In *Buddles* v. *Enright* (1925), 239 N. Y. 354, 146 N. E. 625, *supra*, the court in upholding the statute regulating auction sales of jewelry said:

> "It is a reasonable effort to insure fair public sales, to prevent fraud and deception, and to protect purchasers from the dangers lurking in the darkness of the night. A statute may not accomplish the purpose for which it was intended. Reasonable minds may differ as to its necessity, but where from one side of the argument it appears to be reasonable, and furnishes a fairly good opportunity to accomplish a public benefit or remove an evil, the court should not interfere with its enforcement by declaring it unconstitutional."

The same conclusion was reached in *Holsman* v. *Thomas* (1925), Ohio 147 N. E. 750, 30 A. L. R. 760.

The following are illustrative cases in which this court has upheld statutes, the purpose of which was to prevent

fraud or deception in one or more of its hydra-headed forms:

In *Hall* v. *Geiger Jones Co.* (1917) 242 U. S. 539, 61 L. Ed. 480; *Caldwell* v. *Sioux Falls Stockyards Co.* (1917) 242 U. S. 559; and *Merrick* v. *N. W. Halsey Co.* (1917) 242 U. S. 568, 61 L. Ed. 498, the court upheld the "Blue-Sky Laws" of Ohio, South Dakota and Michigan designed to prevent fraud in the sale of stocks, bonds and other securities to the public.

In the Ohio case, *Hall* v. *Geiger Jones*, the court said, at page 552:

> "Inconvenience may be caused and supervision and surveillance, but this must yield to the public welfare; and against counsel's alarm of consequences, we set the judgment of the state."

See also annotations collecting numerous state cases in 15 A. L. R. 262, 24 A. L. R. 523 and 30 A. L. R. 1331, 40 A. L. R. 1014.

In *Brazee* v. *Michigan* (1916), 241 U. S. 340, 60 L. Ed. 1034, the Michigan law, licensing and regulating employment agencies and designed to prevent fraud and imposition, was upheld.

In *Engel* v. *O'Malley* (1911), 219 U. S. 128, 55 L. Ed. 128, a New York law licensing and regulating the business of banking by individuals and partnerships dealing with newly arrived immigrants was upheld.

The cases could be multiplied indefinitely in which the right of the state to prevent fraudulent sales and unlawful evasion of contracts is upheld on the ground that such right is clearly within the police power of the state.

H. The penalties provided in Section 27 do not deny due process of law or the equal protection of the laws to warehousemen or auctioneers.

Section 27 provides that the penalty for a violation of the Act shall be $500.00, to be recovered by the association aggrieved in a civil suit and that in addition to such penalty the association shall recover a reasonable attorney's fee and the costs involved in such litigation.

In the present case the Association brought a civil action to recover the penal sum of $500.00 and asked for an attorney's fee of $250.00.

A trial by jury was waived by both parties and the court awarded the defendant in error $500.00, but only allowed an attorney's fee of $100.00.

The plaintiff in error complains that the provision for the allowance of an attorney's fee is a denial of due process of law and a denial of the equal protection of the laws.

The plaintiff in error also claims that it was denied a trial by jury.

The latter claim is clearly untenable. There is no denial of a trial by jury. Section 27 requires that a civil suit be brought for the recovery of the penalties provided by the Act. Every question of fact as to whether the Act was violated or not must then be tried before a jury, unless a jury is waived. It is only the penalty that is fixed by law and that necessarily follows the verdict. All other issues of fact are triable as in any other civil action.

However, in the present case, no claim can be made by the plaintiff in error that it was denied a trial by jury for the record clearly recites, on page 25, that "*The trial by jury being waived by the parties and the pet-*

tion being submitted to the court on the law and the facts, it is considered and adjudged that plaintiff, the Burley Tobacco Growers Co-operative Association, recover of the defendant," etc.

The right of the Legislature to impose a reasonable penalty for the violation of a law enacted to promote the public welfare is clear.

That question has been so frequently decided by this court that it is no longer open to question. In *Fidelity Mutual Life Association* v. *Mettler* (1902), 185 U. S. 308; 46 L. Ed. 922, a Texas statute requiring insurance companies which did not pay a loss within the time specified in the policy, to pay a penalty equal to twelve per cent of the policy and attorney's fees, was sustained; and the holding of the Texas court "that it was for the Legislature to determine when the public was so interested in the enforcement of contracts as to justify that enforcement by penalties" was approved.

In Supreme Ruling of the *Fraternal Mystic Circle* v. *Snyder* (1913), 227 U. S. 497, 57 L. Ed. 611, Mr. Justice Hughes said of a similar statute, at page 503:

> "The statute is aimed not at the rights secured by the contract, but at dishonest methods employed to defeat them * * *. The state was entitled at all times to take proper measures to prevent the perversion of its legal machinery, and there was no denial or burdening, in any proper sense, of the existing remedies applicable to the contract by the demand that they be availed of bona fide."

The state has as vital an interest in the enforcement of the co-operative marketing contracts as it has in the enforcement of insurance contracts and has an equal right to penalize any willful and deliberate interference with the marketing system set up in conformity with a public policy to promote such system.

Nor does the fact that the penalty goes to the co-operative association which has been damaged by the guilty warehouse make any difference in the constitutionality of the Act. That point was covered by this court in *St. Louis, Iron Mountain & Southern Railway Company, Plaintiff in Error, v. Dicksey Williams*, 251 U. S.63; 64 L. Ed. 139 (1919).

In that case a rather severe penalty was imposed upon a railroad company which exacted more than the prescribed passenger rate and the penalty was granted to the aggrieved pasenger. The second and third paragraphs of the syllabus in that case read:

> "2. So far as due process of law is concerned, the penalty imposed by a state statute upon a railway company which exacts more than the prescribed passenger fares may be given to the aggrieved passenger, to be enforced by private suit, and such penalty need not be confined or apportioned to his loss or damages.
>
> 3. The penalties prescribed by a statute giving to a passenger aggrieved by a carrier's exaction of a fare in excess of the prescribed rate the right to recover in a civil suit not less than $50 nor more than $300 and costs of suit, including a reasonable attorney's fee, cannot be said to be so severe and oppressive as to be wholly disproportionate to the offense or obviously unreasonable, and hence to amount to a denial of due process of law."

In the course of the opinion by Mr. Justice Van Devanter, the court said at page 66:

> "True, the penalty goes to the aggrieved passenger, and not the state, and is to be enforced by a private, and not a public, suit. But this is not contrary to due process of law; for, as is said in *Missouri P. R. Co. v. Humes*, 115 U. S. 512, 523, 29 L. Ed. 463, 466, 6 Sup. Ct. Rep. 110, 'the power of the state to impose fines and penalties for a violation of its statutory requirements is coeval with government; and the mode in which they shall be enforced, whether at the suit of a private party, or at the suit

of the public, and what disposition shall be made
the amounts collected, are merely matters of legi
lative discretion.' Nor does giving the penalty
the aggrieved passenger require that it be confin
or proportioned to his loss or damages; for, as it
imposed as a punishment for the violation of a pu
lic law, the legislature may adjust its amount to t
public wrong rather than the private injury, just
if it were going to the state. See *Marvin* v. *Tro*
199 U. S. 212, 225, 50 L. ed. 157, 162, 26 Sup. Ct. Re
31."

The right of the Legislature to grant an attorney
fee as part of the costs or as part of the penalty, has r
cently been reviewed and upheld in *Chicago N. W. Ra*
way Co. v. *Nye, Schneider, Fowler Co.* (1922) 260 U.
35; 67 L. Ed. 115.

In that case the constitutional validity of two statut
of Nebraska was involved. The first subjected the i
itial railroad of two connecting lines to liability f
safe delivery of freight by the other. The second mad
every common carrier liable for a reasonable attorney
fee in the court of first instance and on appeal for th
collection from it of every claim for damage or loss
property shipped, not adjusted within sixty days. Th
successful plaintiff was allowed an attorney's fee
$100.00. The Chief Justice reviewed the following case
in all of which the validity of state statutes allowing th
successful plaintiff an attorney's fee were sustained:

Atchison T. & S. F. R. Co. v. *Matthews* (1899), 17
U. S. 96; 43 L. Ed. 909. That case upheld a statute mak
ing railroads liable for fire damage caused by their neg
ligent operation and for a reasonable attorney fee to th
successful plaintiff.

Seaboard Airline Railroad Co. v. *Seegars* (1907), 20
U. S. 73; 52 L. Ed. 108. In that case a statute imposin
a penalty of $50.00 on common carriers for failure t

adjust damage claims within forty days, was sustained, although the damage claim involved was only $1.75.

St. Louis J. M. & S. R. Co. v. *Wynne* (1911), 224 U. S. 354; 56 L. Ed. 799 and *Kansas City So. R. Co.* v. *Anderson* (1914), 233 U. S. 325; 58 L. Ed. 983. These two cases involved the same statute, which required railroad companies to pay claims for live stock within thirty days, with a penalty for failure to do so of double damages and an attorney's fee if plaintiff recovered what he sued for.

In the first case it was held that to apply the statute where the plaintiff failed to recover the amount of his claim was a denial of due process of law; but in the second case where the plaintiff had not demanded more than he sued for and recovered, the statute was upheld.

Yazoo & M. Valley R. Co. v. *Jackson Vinegar Co.* (1912) 226 U. S. 217; 57 L. Ed. 193. A statute was upheld which required every common carrier to settle claims for lost or damaged freight within sixty days and made it liable for $25.00 damages in addition to the actual damages. The claim involved was only $4.76. The statute was held a reasonable incentive to the prompt settlement of just demands "of a class admitting of special legislative treatment."

M. K. & T. R. Co. v. Cade (1914), 233 U. S. 642; 58 L. ed. 1135. A statute requiring settlement of claims for less than $200 within thirty days and providing that if not settled, the successful plaintiff could recover an attorney's fee, was held valid. The court said that the plaintiff usually had the burden in the case and the outlay for an attorney's fee was a necessary consequence of the litigation and it was reasonable to impose the attorney fee upon the party whose conduct made the litigation necessary.

After reviewing the foregoing cases, the Chief Justic says, in *Chicago & N. W. Railway Co. v. Nye, Schneide Fowler Co. supra* at page 43, that the general rule t be gathered from the cases is that where the classifica tion is reasonable the payment of just claims may b enforced by reasonable penalties. "This penalty o stimulus may be in the form of attorney's fees." Th court says that it is only when the statute works "a arbitrary, unequal and oppressive result which shock the sense of fairness" that the statute will be held con trary to the 14th Amendment to the Constitution. I the case under consideration the court said that a pen alty of seven per cent and an attorney's fee of $20 for a case involving a four-days trial "does not shoc one's sense of fairness" and only so much of the statut as imposed a penalty for an appeal was held invalid, a an attempt to deter a successful resort to Superio courts.

In the case at bar, there is every reason for allowin an attorney's fee to the Co-operative Association. Tha Association has a difficult burden in an action against a warehouseman to prevent the warehouseman from inducing, aiding and abetting a member to violate his contract. The preparation and trial of the case involve a considerable expenditure upon the part of the Asso ciation for attorney's fees. It is not fair to place the burden of that fee upon the shoulders of the loyal mem bers of the Association. The burden of paying the attorney should be placed upon the guilty warehouse man whose conduct in inducing a breach of contract contrary to law, makes the litigation and the attorney's fee necessary.

In the case of a co-operative association which has no capital stock and is not conducted for profit, there

is an additional reason peculiar to co-operative cases which supports the legality of the provision for attorney's fees. Unless the attorney's fee was imposed upon the warehouseman whose conduct made the action necessary, it would have to come out of the return received by the farmer members of the co-operative for their crops upon which they depend for a living.

The plaintiff in error relies chiefly upon the decision of this court in *Atchison T. & S. F. Ry. Co. v. Vosburg* (1915) 238 U. S. 56; 59 L. ed. 1199. In that case a Kansas statute, commonly called the "reciprocal" or "mutual" demurrage law, was involved. That law required a railroad company which failed to furnish cars upon proper application, to pay to the party applying, $5 per day for each car which was not furnished, as exemplary damages, and all actual damages and an attorney fee. The law also required the applicant to load cars furnished within forty-eight hours and penalized a failure to do so by requiring him to pay the railroad company $5 per day for each car not used.

The court held that the purpose of the law was reciprocal; namely, to compel the prompt furnishing of cars by the railroad and the prompt use of cars by the applicant. Since both railroad and shipper had equal and reciprocal duties under the law, the court held that the equal protection of the laws was denied to the railroad because it was required to pay an attorney's fee, in addition to the penalty for a violation of law; while the shipper was only required to pay the penalty and no attorney's fee for a violation of the law upon his part.

The difference between the *Vosburg* case and the case at bar is obvious. The Kansas statute involved in the *Vosburg* case was a reciprocal statute. The burden was equal, but the penalty was unequal. In the case at bar,

the statute is not reciprocal. The co-operative statute endeavors to protect co-operative contracts from tortious invasion by third persons not parties to such contracts.

There is no reasonable basis for the suggestion of opposing counsel that the law is unconstitutional because it does not grant the warehouseman a penalty in case the Co-operative Association endeavors to induce patrons of the warehouse to join the Co-operative Association. The Co-operative does not and can not deal in the products of non-members. The auction method of selling tobacco is totally dissimilar from the co-operative marketing system.

Patrons who bring their tobacco to be auctioned off the floor of the warehouse sustain no contract relationship to the warehouse, which merely acts as a commissionaire or auctioneer or warehouseman of the seller's tobacco. That tobacco is owned by the farmer.

It is entirely lawful for a co-operative association to ask a non-member to join the Association and market his tobacco in that manner. That involves no breach of contract relationship. It is entirely different from the action of a warehouseman who, knowing that a particular farmer has signed a co-operative contract and has sold his tobacco for five years to the Co-operative Association, endeavors to have him break that contract and aids him in disposing of his tobacco over the auction floor and thereby prevents the Co-operative Association from availing itself of the remedies to prevent a breach provided by the Co-operative Marketing Act.

The *Vosburg* case is distinguished by Chief Justice Taft in his opinion in *Chicago & N. W. Ry. Co. v. Nye, Schneider, Fowler Co. supra*, at page 43, at follows:

"In *Atchison, T. & S. F. R. Co. v. Vosburg*,

238 U. S. 56, 59 L. ed. 1199, L. R. A. 1915E, 953, 35 Sup. Ct. Rep. 675, a statute requiring prompt furnishing cars by carriers and prompt loading by shippers, and which imposed the same penalty per car upon delinquents of either group, but which added attorney's fee to the penalty imposed on the carriers in case of recovery by a shipper, was held to deny to the carriers the equal protection of the laws, because, in such a case, there was no ground for putting the carriers in a different class from the shippers and imposing a special burden on them when they were both in identically the same situation."

The *Vosburg* case is distinguished by the Court of Appeals in its opinion in the case at bar as follows:

> "Likewise, objection (h) (that there is no provision for defendant to recover an attorney fee against plaintiff if the latter's action to recover the penalty should be dismissed) is of no avail, since defendant is not liable for the penalty or the attorney's fee unless it is guilty of a violation of the act. If the act attempted to penalize both parties for a violation of its terms, it would then, perhaps, be required that they should be equally penalized, and such was true in the case relied on by defendant of *Atchison, etc., Ry. Co. v. Vosburg*, 238 U. S. 59, 35 S. Ct. 675, 59 L. ed. 1199, L. R. A., 1915E, 953, and others cited by counsel supporting the same proposition. We have no such case here. The section attacked in this case (27) does not provide for the preservation and integrity of any contractual relations entered into by the warehouseman (defendant) and plaintiff. The penalty imposed upon the warehouseman is directed solely against it to prevent it from destroying contractual relations existing between plaintiff and its members, and the principles announced in the cases relied on by defendant's counsel are wholly inapplicable."

This court has also held in *Fidelity Mutual Life Association v. Metler* (1902) 185 U. S. 308; 46 L. ed. 922, that there is just ground for making a distinction be-

tween insurance companies operated for profit a
lodges and associations of a benevolent character wh
are not organized for profit and upholding a pena
of an attorney fee for failure to pay insurance clai
promptly, as against insurance companies operated
profit, although no similar penalty was imposed up
insurance companies not for profit.

In *Seaboard Airline Railroad v. Seegars* (1907) 2
U. S. 73; 52 L. ed. 108, the court upheld a statute imp
ing an attorney's fee upon a railroad company; and
so doing, said at page 78:

> "It may be stated as a general rule that an
> which puts in one class all engaged in business
> a special and public character, requires of them
> performance of a duty which they can do bett
> and more quickly than others, and imposes a
> exorbitant penalty for a failure to perform th
> duty within a reasonable time, cannot be adjudg
> unconstitutional as a purely arbitrary classifi
> tion."

The right of the Legislature to enforce insuran
contracts by imposing an attorney fee for failure
promptly comply therewith was recently before th
court in *Hartford Fire Insurance Co. v. Wilson Toom
Fertilizer Co.* (1925) 4 Fed. 2d 835 (C. C. A. 5), C
tiorari denied 45 S. Ct. 639, 69 L. ed. In that case, t
Court of Appeals said:

> "Section 4283 of the Revised General Statutes
> Florida provides in substance that, upon the re
> dition of judgment against any person, compan
> copartnership, corporation, or association in fav
> of the beneficiary under a policy or contract
> insurance, there shall be adjudged in favor of su
> beneficiary a reasonable sum as fee or compens
> tion for the attorneys prosecuting the suit, and th
> the amount thereof shall be included in the jud
> ment. It is contended that this section is repugna
> to the equality and due process clauses of the Fou

teenth Amendment. We think the contention must fail, in view of the decisions of the Supreme Court in *Fidelity Mutual Life Association v. Mettler*, 185 U. S. 308, 22 S. Ct. 662, 46 L. ed. 922; *Home Life Insurance Co. v. Fisher*, 188 U. S. 726, 23 S. Ct. 380, 47 L. ed. 667; *Farmers' & Merchants' Insurance Co. v. Dobney*, 189 U. S. 301, 23 S. Ct. 565, 47 L. ed. 821. These cases hold that legislative classification of insurance contracts is not arbitrary, but reasonable."

In *Chicago, B. & Q. R. Co. v. Feintuch* (1911) 191 Fed. Rep. 482 (C. C. A. 9), the court held in the fifth syllabus that

> "The provision of Interstate Commerce Act Feb. 4, 1887, c. 104, § 16, 24 Stat. 384 (U. S. Comp. St. 1901, p. 3165), for the allowance of an attorney's fee to a petitioner, if he shall prevail in an action to enforce an award of the Interstate Commerce Commission, is not unconstitutional as class legislation."

The argument that the statute is unconstitutional because it only allows an attorney's fee to the successful plaintiff and not to a successful defendant is answered in *M. K. & Texas Railway Co. of Texas v. Cade* (1914) 233 U. S. 642; 58 L. ed. 1135. The fifth paragraph of the syllabus reads:

> "The mere fact that attorneys' fees are allowed by Texas Laws 1909, p. 93, to successful plaintiffs only, and not to successful defendants, does not involve a denial of the equal protection of the laws, contrary to U. S. Const. 14th Amend., if the classification is otherwise reasonable."

The cases are well summed up by the Annotator in 11 A. L. R. 884 in the following statement:

> "The true legal principle seems to be stated in *Gano v. Mpls. & St. L. R. Co.* (1901) 114 Ia. 713, where it is said that always without exception, whenever the attorneys' fees may reasonably be said to be a part of the penalty for failure of a

public regulation, statutes allowing them to b
taxed against the party in default or guilty of th
wrong have been sustained. * * * The courts wit
very few exceptions have upheld statutes allowin
attorneys' fees as a penalty, or part of a penalt
for violating a statute passed under the polic
power. If the allowance of the fee is regarde
merely as a penalty for violation of the statut
there seems to be little ground for questioning th
soundness of the decisions."

**I. Minnesota Wheat Growers Co-op. Mktg. Ass'
v. Radke (1925), 204 N. W. 314, considered.**

The only case which has held any essential part o
the Co-operative Marketing Act invalid is *Minnesot
Wheat Growers Co-op. Mktg. Association v. Radk*
(1925), Minn. 204 N. W. 314. That case is contrary t
every other case; and we submit can not be sustaine
upon reason or authority.

What has been said under this heading of our brie
shows the failure of the Minnesota court to comprehen
the supreme public necessity for the legislation in ques
tion and the fundamental legal principles upon whic
it is based.

The court does not correctly construe the statut
itself. It says that Section 27 is directed against th
innocent conduct of third parties who purchase prod
ucts from members who have voluntarily breached thei
contracts with the Co-operative Association.

That is not the purport of the statute and that is no
the case at bar. What the statute condemns is not th
innocent conduct of a third party, but the deliberat
and wilful action of a warehouseman who, with knowl
edge of the contract relationship, persuades, solicits o
aids and abets a member to break that contract rela

tionship and then assists him in placing the products pledged to the co-operative beyond the reach of the remedies provided by the Co-operative Marketing Act.

Before a warehouseman becomes liable to the penalties provided by the Act he must *first* know of the existence of a contract under the terms of which a member has made a prior sale of his product to the co-operative; *second*, the warehouseman must solicit, persuade, induce or aid the member in breaking his contract; and *third*, he must actually assist him in doing so.

The Legislature has a right to declare that a person who has such guilty knowledge and who deliberately and by overt act brings about the breaking of a contract upon which the success of the whole marketing system depends and which involves the welfare of thousands of other members of the association, has a malicious motive.

When the Legislature has determined that the co-operative marketing system is vital to the welfare of the inhabitants of the state, it has a right to protect that system from outside attack and to punish those who wilfully and by overt act seek to destroy that system and thereby imperil the wellbeing and prosperity of the people of the state.

It does not appear that the true purpose of Section 27 was brought to the attention of the Minnesota court.

Nor does it appear that the Minnesota court considered the right of the Legislature to regulate a business impressed with a public interest.

The police power of the state with respect to laws of this character is not discussed.

The fact that Section 27 is part of a general plan or scheme to accomplish a general purpose and that it

is essential to the accomplishment of that purpose was either not urged or not considered. The contrary decisions by the Supreme Courts of Kentucky and Virginia and Texas are not mentioned or cited.

The entire decision is based upon the single point that Section 27 invades the "liberty of contract." It may be conceded that the Constitution protects liberty to make contracts that are not detrimental to the public interest within certain recognized limitations, but the Constitution does not guarantee the right to break contracts. Legislation which is designed to secure the enforcement of contracts does not deprive persons of the liberty of contract. On the contrary, such legislation secures and protects that liberty. Such legislation upholds and maintains the integrity of contracts. It is jesting with the law to say that legislation which has for its whole purpose the protection of the right to make lawful contracts and the safeguarding of such contracts from unlawful interference, is unconstitutional because it constitutes an unreasonable restraint of the liberty of contract.

There certainly is no liberty upon the part of warehousemen to solicit or persuade other persons to break contracts. There is no liberty guaranteed to middlemen which authorizes them to aid contract breakers in disposing of their goods contrary to law. There is no more liberty to do this than there is liberty upon the part of a pawn-broker to aid a person in disposing of goods voluntarily brought to him, but which the person who brings it has no right to sell.

We respectfully submit that the Minnesota court erred in its conception of a "voluntary" breach of contract as a *rightful* breach. The old idea of the "*right*" to break contracts is no longer accepted as good law. The true

and the modern view is that the *power* to break a contract should not be confused with the *right* to break a contract. The fact that specific performance is granted by the courts is sufficient demonstration that in cases which warrant this remedy there is no "*right*" to break a contract. Specific performance is generally granted to enforce co-operative contracts. That remedy is provided by statute. It is agreed to in the contract.

Hence the argument that a member has a "right" to break his contract and dispose of his goods contrary thereto is unsound. And such member is not deprived of any liberty to dispose of his goods by the prohibitions of Section 27, which are designed to prevent warehouseman from helping him dispose of such goods at public auction in violation of his contract.

The provision for specific performance granted to the co-operative association constitutes a recognition of the equitable interest of such association in the crop produced by a member and which he agrees to deliver to the association. This equitable interest is a property right in such crop and a member has no "*right*" or "*liberty*" to convey or dispose of this crop so as to defeat the equitable interest of the association.

The fact that Section 27 makes it difficult for a member to dispose of his crop after he has *wrongfully* breached his contract does not deprive him of any liberty to dispose of property. The member has exercised his liberty to dispose of his crop by voluntarily entering into a contract to sell such property to the co-operative association. It is not Section 27 but the voluntary action of the member which deprives him of liberty thereafter to make a different disposition of such property.

A co-operative member is no more deprived of liberty

to dispose of property by the difficulty of disposing of such property at public auction, contrary to his co-operative contract, than any individual who sells real estate is deprived of his liberty to thereafter make a different disposition of such real estate in violation of his former contract by court process requiring him to perform his first contract specifically.

Even if the Act is construed as narrowly as the Minnesota court construes it, the Legislature has a right to prohibit auctioneers and warehousemen from auctioning off goods of persons who have no right to dispose of such goods and who are seeking in that manner to prevent the true owner from enforcing his contract by injunction or specific performance.

There is no liberty to evade the law. There is no liberty to dispose of goods with a view of putting the same beyond the reach of creditors. When the remedies of injunction and specific performance are granted by law there is no liberty to aid a member of a co-operative in putting his goods beyond the process of law. There is no liberty to assist another in evading the law. Both the act of evasion and the act of aiding and abetting the evasion may be condemned and punished by legislation.

There is no more liberty to illegally interfere with the contract relations between a member and his co-operative association than there is to illegally interfere with the relations between employer and employee.

The single reason upon which the Minnesota decision rests is conclusively answered in the recent decision of this court in *Dorchy* v. *Kansas*, (1926) 71 L. ed.; U. S. Sup. Ct. Advance Opinions November 1, 1926, page 23. In that case Section 17 of the Industrial Relations Act of Kansas was considered. That Act made it unlawful to

conspire to induce others to quit their employment. Section 19 made it a felony for an officer of a labor union to use his influence to induce another person to violate any provision of the Act. Dorchy was prosecuted criminally for violating Section 19 and was found guilty of inducing others to quit their employment contrary to Section 17. His conviction was affirmed by the state court. (*State* v. *Howat*, 112 Kans. 235; 210 Pac. 352.)

Dorchy claimed on appeal to the Supreme Court that this section denied him the liberty guaranteed by the Fourteenth Amendment; but this court held that there was no liberty to interfere with the relationship between employer and employee and to induce employee to go out on a strike in order to assist a member of the union to collect a stale claim. In the opinion of the court, Mr. Justice Brandeis said:

> "The right to carry on business—be it called liberty or property—has value. To interfere with this right without just cause is unlawful. The fact that the injury was inflicted by a strike is sometimes a justification but a strike may be illegal because of its purpose, however orderly the manner in which it is conducted. To collect a stale claim due to a fellow member of the union who was formerly employed in the business is not a permissible purpose. * * * The Legislature may make such action punishable criminally, as extorion or otherwise. And it may subject to punishment him who uses the power or influence incident to his office in a union to order the strike. Neither the common law, nor the Fourteenth Amendment, confers the absolute right to strike."

Paraphrasing the words of the above opinion and applying them to the present case, the right to carry on the co-operative marketing business—be it liberty or property—has value. It depends upon the contract relationship between the members. To interfere with this right is unlawful. To knowingly persuade a member to

brach his contract, aiding and assisting him to place hi property beyond the reach of the remedies provided b law to enforce such contract and making a personal profi by commission or otherwise out of this induced breac of contract, is not a permissible purpose. And the Leg islature may subject to punishment those who use thei power or influence to do this.

Neither the common law nor the Fourteenth Amend ment confers an absolute liberty to interfere with th contract rights and business of others.

The Minnesota court refers to the last paragraph o Section 27 as follows:

> "The last paragraph in the section, intended per haps to express the legislative purpose, is evidentl borrowed from the experience of other states rela tive to crops not raised to any important extent i this state."

The first answer to this suggestion is that the Legisla ture, not the court, is the judge of the necessity and o the experience of the state. We take it there will be n contradiction in the present case that the experience o Kentucky in the marketing of its tobacco crop amply jus tified the expression of the legislative purpose in tha state.

The Minnesota court also refers to the purchase fro the true owner of an agricultural commodity upon whic there is no lien and which is not under any ban or regula tion as being within the liberty protected by the Consti tution. That point need not be argued. The Legislatur does not condemn the purchase in the ordinary course o business from the unquestioned owner of wholesome agri cultural products. The Legislature condemns the solic tation or persuasion not in the ordinary course of bus ness of a warehouseman who seeks to induce a breac

of contract and who participates in that induced breach with knowledge of the contract, by aiding and assisting the contract breaker in placing his products beyond the reach of the remedies provided by law. The law does not condemn the purchase of products upon which there is no lien. The co-operative marketing contract constitutes a present sale of crops over a period of five years. The contract in question in this case reads:

> "2. The association agrees to buy and the grower agrees to sell and deliver to the association all the tobacco produced by or for him or acquired by him as landlord or lessor, during the years 1922, 1923, 1924, 1925 and 1926." (R. 4.)

Paragraph 4 provides that the tobacco shall be delivered at the earliest reasonable time after cutting, to the order of the association.

Paragraph 11 provides that while the grower may stop growing tobacco at his free discretion that if he produces tobacco "it shall be all included under the terms of this agreement and must be sold only to the Association."

Paragraph 18b provides that in the event of breach or threatened breach regarding delivery of tobacco, the Association shall be entitled to an injunction and to a decree of specific performance, because the buyer can not go to the open market and buy tobacco to replace any which the grower may fail to deliver.

Under the law, these contracts have been held to give the co-operative association a prior lien upon the tobacco.

Feagin v. *Dark Tobacco Growers' Co-op. Assn.*, (1924) Ky. 261 S. W. 607.

Coyle v. *Dark Tobacco Growers' Co-op. Assn.* (1925), Ky. 277 S. W. 318.

Dark Tobacco Growers' Co-op. Assn. v. *Daniels* (1926), Ky. 284 S. W. 399.

Kansas Wheat Grower's Assn. v. *Floyd* (1924).

Kansas Wheat Growers' Assn. v. *Robbin*, 227 Pac. 336.

Hence, when a member attempts to sell tobacco to or through a warehouseman who knows it has been sold under a prior contract to the co-operative association, that warehouseman is in a similar situation to those who assist mortgagors in disposing of mortgaged or pledged property so as to defeat the rights of the mortgagee or pledgee.

We therefore submit that the decision of the Minnesota court in the *Radke case* is unsound in its reasoning; is not based upon a correct interpretation of the law or a complete presentation of the general system of which Section 27 is an essential part; and that the decision is contrary to the decisions of this court and to all other courts without exception.

For these reasons we urge, *first*, that Sections 26 and 27 are essential provisions of the Standard Co-operative Marketing Act necessary to make such system practical and effective; *second*, that the penalties provided in such sections are reasonable and necessary to prevent illegal interference with the contract relationship upon which the system and business of co-operative marketing depends; *third*, that the Legislature has a right to impose reasonable regulations covering warehouses and public auctions on the ground that they constitute a business impressed with a public interest and are subject to the police power of the state to penalize a breach of such regulations.

III.

THE BURLEY TOBACCO GROWERS CO-OPERATIVE ASSOCIATION IS ORGANIZED IN ACCORDANCE WITH THE LAWS OF KENTUCKY AND OF THE UNITED STATES, AND IS NOT ORGANIZED OR DOING BUSINESS IN VIOLATION OF STATE OR FEDERAL ANTI-TRUST LAWS.

The first paragraph of the amended answer charges that the defendant in error is a trust or combination contrary to the common law of Kentucky. The decision of the highest court of Kentucky that the defendant in error is not organized or doing business in violation of the Anti-Trust Laws of Kentucky is not subject to review here.

The second paragraph of the amended answer charges that Sections 26 and 27 violate the State and Federal Constitutions. The decision by the highest court of Kentucky that the Kentucky Constitution is not violated by such sections is final, and the claim that these sections violate the Federal Constitution has been fully discussed under a previous heading of this brief.

The third paragraph of the amended answer and counterclaim is a queer pleading. It purports to be an application for a so-called "*declaratory judgment*" under the provisions of the *Kentucky Declaratory Judgment Law, Chap. 83, Acts of 1922.* A declaration is asked as to the rights and duties of the plaintiff in error, the Liberty Warehouse Company, under "said Bingham Co-operative Marketing Act in relation to the common law and the State and Federal Constitutions as well as the Sherman Anti-Trust Law, and for the purpose of having this court determine whether in the conduct of its business it will be necessary for it to comply with the provisions of

the said Bingham Co-operative Marketing Act, whether it is invalid in whole or in part, and if so, in what part."

The pleading then recites that the defendant in error, the Burley Tobacco Growers Co-operative Association, was organized in accordance with the Co-operative Marketing Act. This is followed by numerous allegations and conclusions of law to the effect that the Bingham Act permits the fixing of prices artficially and permits the organization of combinations forbidden by the State and Federal Anti-Trust laws.

The pleading continues with the statement to quote literally "that by reason of said provisions and pursuant to which plaintiff and its constituent members, which at all times has *operated* and *conducted* its business, plaintiff is and at all times since the 13th day of January, 1922, has been a trust or combination of the capital, skill and acts of divers persons and organizations carrying on a commercial business in the state of Kentucky, and between said state and elsewhere in the United States of America and France and Italy in Europe, and is organized and conducted for the express purpose of unlawfully and contrary to the common law, creating and carrying out restrictions in trade, to-wit:" (R. 21.) This is followed by another long list of legal conclusions that the purpose authorized by the Co-operative Marketing Act was to fix prices, limit production, etc., under the guise of stabilizing prices.

The pleading further states that the members of the Co-operative Association have realized better prices for their products than "defendant's patrons, who are non-members of the pool," and that by reason thereof a number of the patrons of the plaintiff in error have joined the Co-operative Association.

This curious pleading concludes with the charge that the organization of the defendant in error and the conduct of its business in accordance with the Co-operative Marketing Act of Kentucky is "in violation of the Act of Congress, passed August 27, 1894, Chapters 349, Section 77, and the Act of Congress, passed October 5, 1914, Chapter 323, Section 4, or what is known as the Sherman Anti-Trust and Clayton Acts, to defendants threefold damages in the sum of $60,000.00." (R. 24.)

The prayer of this so-called counterclaim is as follows:

> "Wherefore, defendant upon its amended answer and counterclaim against plaintiff herein prays this court by its judgment to declare its rights and duties under said Bingham Act of 1922, in relation to the constitution, State and Federal, and the Sherman Anti-Trust Law as amended; and that a judgment be entered declaring said Bingham Act of 1922 invalid and especially Sections 26 and 27 thereof and for a judgment for treble damages under the Sherman Anti-Trust Law as amended in the sum of $60,000.00 and reasonable attorney's fee and costs and all proper relief."

The defendant in error moved to strike this counterclaim. Its motion was granted. The grounds upon which it was granted are:

(a) The defendant in error is not an illegal trust or monopoly in violation of either State of Federal laws.

(b) An action to recover a civil penalty under the Co-operative Marketing Act for a violation of the Act cannot be converted into an action to secure a declaratory judgment under the Kentucky Declaratory Judgment Law by a counterclaim.

(c) The State court has no jurisdiction to entertain a counterclaim by the defendant for treble damages under the Sherman Anti-Trust Law of the United States.

An action for treble damages under the Sherman Anti-Trust Law must be a direct action in the Federal Courts for such purpose.

(d) An inter-meddler, not a party to the contract, cannot maintain an action of this character.

We do not desire to avoid a decision on the merits of the question as to whether the organization of the defendant in error and its method of doing business under the Standard Co-operative Marketing Act of Kentucky is a violation of the Sherman Anti-Trust Law, and therefore devote the major part of this heading to a discussion of this point. Its importance cannot be over estimated because if the organization and method of doing business of the Burley Tobacco Growers Co-operative Association violates the Federal Anti-Trust Law, then practically every large farmers' co-operative association is doing business contrary to such law, because the overwhelming majority of such associations are organized and are doing business under and in accordance with similar laws.

A. The Burley Tobacco Growers Co-operative Association is not organized or doing business in violation of the Sherman Anti-Trust Law.

The Burley Tobacco Growers' Co-operative Association is organized in strict conformity with law. It complies with every provision of the Co-operative Marketing Act of Kentucky. It complies with every provision of the Federal laws authorizing co-operative marketing associations of agricultural producers.

The answer and counterclaim of the plaintiff in error does not deny that the defendant in error is organized and doing business in strict conformity with State and

Federal law, but asserts that the State law authorizing the organization and operation of co-operative marketing associations of the character of defendant in error conflicts with the laws of the United States prohibiting illegal combinations or conspiracies in restraint of trade.

The answer and counterclaim does not set forth any specific facts to show any illegal combination or conspiracy in restraint of trade; but contains numerous legal conclusions to the effect that the structure of the organization is itself condemned by Federal law.

We are therefore confronted with the question of whether a co-operative association formed in accordance with State and Federal law and doing business in conformity with such laws, constitutes an illegal trust or monopoly within the meaning of the Sherman Anti-Trust Law.

This includes the question of whether the Co-operative Marketing Act of Kentucky conflicts with the Anti-Trust Laws of the United States.

We submit that neither the Co-operative Marketing Act of Kentucky nor the Defendant Association violate the Federal Anti-Trust law for the following reasons:

1. The type of co-operative marketing association authorized by the Co-operative Marketing Act is, by reason of its structure and purpose, without the scope of the evils which the Sherman Law was intended to prevent.

2. The State law excludes associations organized under and complying with such law from condemnation under the Anti-Trust Law.

3. The Federal Law specifically authorizes the doing of business by co-operative associations like the defendant in error and provides that such association shall not be held illegal under the Anti Trust Acts.

4. The courts of Kentucky, Ohio, Tennessee and Indiana have all specifically held that the defendant in error is not organized or operating contrary to the anti-trust laws of the United States or of the several states.

5. All courts have uniformly held that co-operative associations of the type of defendant in error are not trusts or monopolies and do not unlawfully restrain trade contrary to either the common law or the statute law of state or nation.

A. 1. *The Co-operative Marketing Act does not authorize evils condemned by Sherman Anti Trust Law.*

The purpose of the Sherman Anti-Trust Law was to prevent certain well recognized evils. It was directed against combinations and conspiracies to unfairly or unreasonably restrain trade or crush competition, to the injury of the public.

Although the Act was first thought to prevent all combinations in restraint of trade whether the restraint was reasonable or not, it has been definitely established that only unreasonable restraints are within the condemnation of the law; and to quote the language of Chief Justice White, in *U. S. v. Standard Oil Co.* (1910) 221 U. S. 1: "In every case where it is claimed that an act or acts are in violation of the statute, the rule of reason, in the light of the principles of law and public policy which the act embodies, must be applied."

U. S. v. American Tobacco Co. (1910) 221 U. S. 106; 55 L.ed. 663.

The purpose of the Co-operative Marketing Acts is not to authorize a combination for the purpose of unreasonably restraining trade, but to authorize an Association of agricultural producers for the purpose of stimu-

lating and fostering trade by enabling the orderly marketing of farm products.

In order to prevent the possibility of the combination authorized by the Act becoming an instrument for the unfair and unreasonable restraint of trade, numerous and definite provisions are contained within the Act to insure democratic control; to eliminate the element of profit; to secure equality among all members; and to bring the Association under complete public control and supervision.

The *Bingham Co-operative Marketing Act* specifically declares the purpose of such associations as follows:

> "§1. (a) In order to promote, foster and encourage the intelligent and orderly marketing of agricultural products through co-operation; and to eliminate speculation and waste; and to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done; and to stabilize the marketing of agricultural products, this Act is passed."

Section 5 of the Act provides that persons contemplating the organization of an association under the Act are urged to communicate with the Dean of the College of Agriculture of the University of Kentucky "who will inform them whatever a survey of the marketing conditions affecting the commodities proposed to be handled may indicate regarding probable success."

Section 5 further provides:—

> "that the public interest urgently needs to prevent the migration from the farm to the city *in order to keep up farm production* and to *preserve the agricultural supply of the nation;* and that the public interest demands *that the farmer be encouraged to attain a superior and more direct system of marketing in the substitution of merchandising for the blind, unscientific and speculative selling of crops;* and that for this purpose, the farmers should secure special guidance and instructive data from the Dean

of the College of Agriculture of the University of Kentucky." (Italics ours.)

The membership contract which the plaintiff in error was convicted of having wrongfully induced a member to break likewise states and purpose of defendant in error as follows:

"The Burley Tobacco Growers Co-operative Association, a non-profit association, hereinafter called the association, first part, and the undersigned growers, second part, agree:

"This is for Co-operative Marketing

1. The grower is a member of the Association and is helping to carry out the express aims of the Association for co-operative marketing, for minimizing speculation and waste and stabilizing tobacco markets in the interest of the grower and the public, through this and similar obligations undertaken by other growers."

The very purpose of the co-operative association is to foster and promote trade and to encourage scientific and orderly marketing and thereby advance the public interest.

To make certain that the authority to combine for such purpose is not abused, the Bingham Act contains a complete code governing:

The purpose (Sec. 4.)

The powers (Sec. 6.)

The Membership (Sec. 7.)

The By-laws (Sec. 20.)

The elections (Sec. 11, 12, 13.)

Capital Stock (Sec. 14.)

The marketing contract (Sec. 17.)

The remedies for breach of such contract (Sec. 18.)

Provisions for public accounting (Sec. 20.)

Capitalistic or monoplistic control is prevented by the following provisions:

First, membership is limited to farmers "engaged in the production of the agricultural products to be handled by or through the Association."

Second, the complete elimination of all possibility of the Association making any profit for itself as an association. (Sec. 2-(d).) And the provision that the Association must pay over to its members all amounts received from the sale of their products less the necessary costs and expenses of selling such products. (Sec. 17.)

Third, that "No association shall handle the agricultural products of any non-member, except for storage." (Sec. 6-(a).)

Fourth, the requirement of one vote per member regardless of the size of the crop delivered to the Association or the amount of stock held by a member. (Sec. 14.)

> "No member or stockholder shall be entitled to more than one vote regardless of the number of shares of common stock owned by him."

Thorough democratic control of co-operative associations organized under the Bingham Act is assured not only by the provision for one vote per member but by the requirement that each association must adopt by-laws for its government and management covering the time, place and manner of calling and conducting meetings and elections and voting. (Sec. 10.) And by a further provision that ten per cent of the members or stockholders may require special meetings of the Association (Sec. 11) and that directors shall be elected, hold office and be removed only as provided in the Act. (Sec. 12, 13 and 15.)

There is a further provision for a referendum of the entire membership upon matters acted upon by the Board. (Sec. 16.)

Complete public supervision and control of the Association is secured by the appointment by a public official or commission of certain directors who "shall represent primarily the interest of the general public in such associations. The director or directors so appointed need not be members or stockholders of the Association; but shall have the same powers and rights as other directors." (Sec. 12.)

The Act also requires each association to prepare and make out an annual report "on forms to be furnished by the Dean of the College of Agriculture of the University of Kentucky, containing the name of the Association; its principal place of business; and a general statement of its business operations during the fiscal year, showing the amount of captal stock paid up and the number of stockholders of a stock association or the number of members and amount of membership fees received, if a non-stock association; the total expenses of operations; the amount of its indebtedness or liabilities, and its balance sheets."

The powers of the Association are limited by law. (Sec. 6.)

The by-laws of the Association must be adopted in accordance with the powers granted by the Act. (Sec. 10.)

Associations which do not strictly comply with the provisions of the Act are forbidden to use the term "cooperative" as part of its corporate or other business name. (Sec. 22.)

The character of contract which the Association is permitted to make is specifically defined by the Act. (Sec. 17.)

The contract actually made by the Association which appears in the Record on pages 4 to 10 complies in every

detail with the statutory provision for such marketing contract. Although the law authorizes a ten year contract, the actual contract only covers five years.

There is no attempt to fix prices in this contract. On the contrary, Section 6 of the contract provides that the Association "agrees to resell such tobacco (delivered by the members) together with tobacco of like type, grade and quality delivered by other growers under similar contracts at the best prices obtainable by it under *market conditions.*" (Contract, Sec. 6; R.5-6.)

Section 8 of the contract further provides that the Association will endeavor to sell such tobacco at such time and in such form and under such conditions "as will serve the joint interest of the growers and the public." (Section 8.)

There is no effort to control production.

On the contrary, two specific provisions of the contract cover the right of the grower to determine for himself whether he will produce any tobacco and if so, how much.

Section 11 (R. 7) provides

> "*The grower shall have the right to stop growing tobacco and to grow anything else at any time at his free discretion.*"

Section 12 provides:

> "Nothing in this agreement shall be interpreted as compelling the grower to deliver any specified quantity of tobacco each year; but he shall deliver the tobacco produced by or for him." (R. 7.)

The contract further prevents the Association from making any profit by requiring that the entire amount received from the sale of the products delivered by members of the Association shall be paid back to the members, less the cost of maintaining the Association and of

handling, grading and marketing the tobacco. (Contract, Sec. 6; R. 6.)

A reserve for credit and general commercial purposes is permitted but is expressly limited to one per cent of the gross resale price and any surplus from this reserve deduction "must be prorated among the growers delivering tobacco in that year on the basis of deliveries." (Contract, Sec. 6; R. 6.)

Equality between members is secured by Section 7 of the contract, which provides that while the Association may handle the tobacco in different ways so as to sell the same to the best advantage, "the net proceeds of all tobacco or tobacco products of like type, quality and grade, less charges, costs and advances, shall be divided rateably among the growers in proportion to their deliveries in each pool." (R. 6.)

For these reasons we contend that aside from any specific exemptions from the anti-trust laws which are contained in both the Bingham Act and the Sherman Act, co-operative associations authorized by the Bingham Act and typified by the defendant in error are not illegal trusts or combinations in violation of the Sherman Anti-Trust Law.

The Sherman Anti-Trust Law is not violated because:

The purpose and operation of such associations stimulate and promote trade and do not prevent or restrain trade.

Competition in the production of a superior quality of tobacco between individual members is encouraged by the assurance which the co-operative plan affords of a better price for the best grades of tobacco. (Section 4b; R. 5), and the standardization of grading and the sale of tobacco upon the merit of the grades.

The Association can not engage in unfair competition with others because it can only handle the products of its own members.

Such restraint of trade or competition which is necessarily involved in order to secure co-operative action is a reasonable restraint which is permitted by the Sherman Anti-Trust Law as interpreted by the decisions of this court.

The Association has no capital and cannot accumulate capital or make a profit.

Membership in the Association is limited to agricultural producers who each have an equal voice in the Association by the provision for one vote per member or stockholder.

It is not only a legal but an economic impossibility for associations organized and operating in accordance with law to accomplish the evils aimed at by the Sherman Anti-Trust Law.

The principal point urged by the plaintiff in error is that the defendant in error by reason of the co-operative action of thousands of farmers will have charge of the selling of approximately 75 per cent of the Burley tobacco crop. The erroneous conclusion is drawn that the Association can therefore control or fix the price of Burley tobacco. Economic laws and actual experience alike demonstrate the falsity of such conclusion.

Large industrial companies which produce oil, automobiles, steel or other articles can fix the price of their products within certain economic limits because they control not only the selling but the production of such products. Furthermore the amount of capital required to engage in competition with such large industrial concerns practically prohibits others from entering the field on a large scale.

However, associations of agricultural producers cannot arbitrarily fix prices; and the defendant in error has not attempted to do so, because co-operative associations have no control over production; and if they should attempt to arbitrarily fix a high price, thousands of farmers would plant tobacco in place of less profitable crops; and overproduction and a surplus of tobacco would bring prices down to disastrous levels. In other words, the inexorable law of supply and demand operates to prevent an arbitrary enhancement of price by farmers' co-operative associations.

Unlike manufacturing and industrial corporations, the farmer associations have no control over the factor of supply except that such associations may prevent a dumping of the entire crop upon the market at one *place* or at one *time*. By orderly marketing, that is by adjusting supply to demand, co-operative associations enable the law of supply and demand to function and thereby help to secure a price to the farmer on the basis of market conditions. Hence the fact that the defendant in error may be charged with selling three-fourths of the Burley tobacco grown in the United States does not enable it to fix arbitrary prices or to control production or to enhance prices unreasonably. However, it does enable the Association to secure better prices for the farmer without increasing the price to the consumer and without impairing the profit of the manufacturer by:

(a) Encouraging the production of a better quality of tobacco;

(b) Adopting standardized grades;

(c) Scientific grading of each farmers' tobacco and its sale upon the basis of grade;

(d) The elimination of unnecessary middlemen.

commission men, auctioneers and other wastes in the system of selling;

(e) The direct sale of tobacco from producer to consumer without intervening agencies;

(f) Better systems of curing, processing and storing of tobacco and the elimination of unnecessary waste in connection therewith;

(g) Providing a reasonably constant supply to meet demand at all seasons and eliminating periods of oversupply and or scarcity and the manipulation and speculation incident thereto;

(h) The development of an increased demand by the opening of new markets, advertising and other business methods;

(i) Scientific selling based upon a study and knowledge of local, national and world markets;

(j) A sound financial plan and the ability to borrow large sums at the lowest interest rates;

(k) Efficient and intelligent concentration, distribution and transportation to obtain the lowest applicable freight and transportation rates.

The ability of the defendant in error to better prices for its members without increasing the price to the consumer by reason of the above listed economies in: (1) producing; (2) grading; (3) processing; (4) storing; (5) financing; (6) selling, and (7) transporting, is not only a matter of sound reason and theory but of actual experience extending over a period of nearly six years.

In reported cases in which these matters were gone into as questions of fact, notably in *List* v. *Burley Tobacco Growers Co-op. Assn.* (1926) 114 O. S. 361; 151 N. E. 471, and *State of Tennessee ex rel Thompson, At-*

torney General v. *Burley Tobacco Growers Co-op. As* (decided by Court of Appeals of Tennessee, July 1926; Writ of Certiorari denied by Supreme Court Tennessee January 15, 1927), it was definitely establish that the Burley Tobacco Growers Co-operative Assoc tion had stabilized prices; and by improved metho better grading, storing, processing, financing and selli had:

First, increased the net return to the tobacco farme both member and non-member;

Second, decreased the price of tobacco to the ultima consumer;

Third, enabled the manufacturer of Burley tobacco increase earnings and profits.

A combination of farmers such as the defendant error is unique in that it not only helps its own membe secure better prices but also helps farmers who are n members of the Association and who enjoy the benef of a stabilized market and of the better price bas achieved by the Association's efforts.

From a selfish standpoint, the non-member is some times better off than the Association member because h receives the benefit of better market conditions and doe not pay his share of the cost of maintaining the Associa tion which is responsible for these improved condition

There is no element that has not profited from th organization and operation of the Burley Tobacco Grow ers Co-operative Association except the middleman o speculator whose services in the marketing scheme ma have been made unnecessary. This class includes th plaintiff in error and explains the motive behind its a tack upon the co-operative plan of which it was con victed in this case. All other elements of the public including the *producer*, the *manufacturer* and the *con*

sumer of tobacco have been benefited by the organization and operation of the Burley Association.

Of course, the size of the Association due to its large membership and its ability to sell large quantities of tobacco enables it to obtain such advantages for its farmer members as are enjoyed by large enterprises. However, the fact that the Association includes three-fourths of the Burley tobacco growers within its membership and that it is therefore an important and influential factor in the selling of tobacco, does not make it illegal under the Sherman Anti-Trust Law.

This court has definitely decided that mere size and unexerted power does not make a corporation a violator of the Anti-Trust Act, *U. S. of America* v. *U. S. Steel Corp.* (1920) 251 U. S. 417; 64 L. ed. 343. In delivering the opinion of the court, Mr. Justice McKenna said:

> "The corporation is undoubtedly of impressive size, and it takes an effort of resolution not to be affected by it or to exaggerate its influence. But we must adhere to the law, and the law does not make mere size an offense or the existence of unexerted power an offense. It, we repeat, requires overt acts, and trusts to its prohibition of them and its power to repress or punish them. It does not compel competition, nor require all that is possible."

No overt acts are complained of by the plaintiff in error in the present case and the record is devoid of any proof or allegation that the defendant in error has been guilty of any specific act condemned by law.

In the absence of such allegation or proof, there is no doubt that the size of the Association does not make it a violator of the Anti-Trust Law. As this court said in the above case, "The public interest is of paramount regard" and the Legislature has determined that the public interest requires the encouragement of co-operative enterprises as extensive as the commodity to be sold.

This view is also held by the United States Department of Agriculture and is ably set forth by Secretary Jardine in his report to the President, printed as Appendix "A" of this brief.

Recently this court passed upon a nation-wide plan of selling, based upon a patent monopoly in which size was again urged as an argument for a condemnation of the scheme; *U. S. of America* v. *General Electric Co.* (decided November 23, 1926, reported U. S. Supreme Court Advance Opinions December 15, 1926; 71 L. ed. 216. In the opinion, the Chief Justice said:

> "We are of the opinion, therefore, that there is nothing as a matter of principle or in the authorities which requires us to hold the genuine contracts of agency like those before us, however comprehensive as a mass or whole in their effect, are violations of the Anti-Trust Act."

In the above cases it was shown that the Steel Corporation controlled more than 50 per cent of the steel business and the General Electric Company controlled more than 69 per cent of the electric light business.

A considerable part of the answer or counterclaim relates to allegations that the organization and operation of defendant in error has brought about a stabilization of market conditions and that the market is no longer subject to rapid and wide fluctuations in price and unwarranted speculation at the expense of the farmer. It is our belief that such stabilization is a benefit and not an evil and that whatever the Association has done in this connection is in the public interest.

In that belief we are strengthened by the opinions of this court in *Maple Flooring Manufacturers' Association* v. *U. S. of America* (1925) 268 U. S. 563; 69 L. ed. 1093; and *Cement Manufacturers Protective Association* v. *U. S.* (1925) 206 U. S. 588; 69 L. ed. 1104.

In the *Maple Flooring Manufacturers Association* case, the activities of that association in computing and distributing information to its members as to the average costs of their product and as to freight rates and as to trade statistics and the holding of association meetings which resulted in a stabilization of the market, were sustained. In holding that these activities were not a violation of the Anti-Trust Law, the court, speaking through Mr. Justice Stone, said at page 582:

> "It is not, we think, open to question that the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uniformity of price and trade practice. Exchange of price quotations of market commodities tends to produce uniformity of prices in the markets of the world. Knowledge of the supplies of available merchandise tends to prevent overproduction and to avoid the economic disturbances produced by business crises resulting from overproduction. But the natural effect of the acquisition of wider and more scientific knowledge of business conditions, on the minds of the individuals engaged in commerce, and its consequent effect in stabilizing production and price, can hardly be deemed a restraint of commerce, or, if so, it cannot, we think, be said to be an unreasonable restraint, or in any respect unlawful.
>
> It is the consensus of opinion of economists and of many of the most important agencies of government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels, and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise. Free competition means a free and open market among both buyers and sellers for the sale and distribution of commodities. Competition does not become less free merely because the conduct of commercial operations

becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction. General knowledge that there is an accumulation of surplus of any market commodity would undoubtedly tend to diminish production, but the dissemination of that information cannot, in itself, be said to be restraint upon commerce in any legal sense.

* * * * *

It was not the purpose or the intent of the Sherman Anti-Trust Law to inhibit the intelligent conduct of business operations, nor do we conceive that its purpose was to suppress such influences as might affect the operations of interstate commerce through the application to them of the individual intelligence of those engaged in commerce, enlightened by accurate information as to the essential elements of the economics of a trade or business, however gathered or disseminated. Persons who unite in gathering and disseminating information in trade journals and statistical reports on industry, who gather and publish statistics as to the amount of production of commodities in interstate commerce, and who report market prices, are not engaged in unlawful conspiracies in restraint of trade merely because the ultimate result of their efforts may be to stabilize prices or limit production through a better understanding of economic laws and a more general ability to conform to them, for the simple reason that the Sherman Law neither repeals economic laws nor prohibits the gathering and dissemination of information."

The activities of the *Cement Manufacturers Protective Association* were sustained although it was conceded that there was a substantial uniformity in the price of cement; but the court said that with a standardized product sold wholesale to fully informed professional buyers, uniformity in price would inevitably result from active, free and unrestrained competition in the absence of combination. (pp. 605-606.)

On the basis of the above decisions, neither the size

nor the activities of the defendant in error are contrary to law.

The Bingham Act does not authorize or permit the defendant Association to engage in business or activities prohibited by the Sherman Anti-Trust Law.

Therefore, from both a legal and an economic standpoint, there is nothing inherent in the structure, organization, or operations of the defendant in error or the Act authorizing such organization and business, which bring the same in conflict with the Sherman Anti-Trust Law.

A-2. *The Co-operative Marketing Act Excludes Associations Organized Thereunder from Condemnation as Illegal Trusts or Monopolies.*

Section 28 of the Bingham Co-operative Marketing Act provides:

> "Associations Are Not in Restraint of Trade.
> Any association organized hereunder shall be deemed not to be a conspiracy nor a combination in restraint of trade nor an illegal monopoly; nor an attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this state; and the marketing contracts and agreements between the association and its members and any agreements authorized in this act shall be considered not to be illegal nor in restraint of trade nor contrary to the provisions of any statute enacted against pooling or combinations."

Similar sections are contained in practically all of the standard Co-operative Marketing Acts.

We have previously discussed the validity of this declaration of public policy and the right of the Legislature to provide for the classification and incorporation of farmers' co-operative associations and to exclude the same from the condemnation of the Anti-Trust Laws.

If the provision contained in Section 28 is valid, as

uniformly held by all courts, then the claim that the Bingham Act, or associations formed and acting thereunder, are contrary to the State and Federal Anti-Trust Laws must fail.

There is no need to repeat here the argument previously made in support of this provision, but we desire to call attention to the recent (1926) discussion of this subject in Corpus Juris in the article on monopolies, 41 C. J. 76, at page 166, in which the general rules are summarized as follows:

> "Co-operative Agricultural Marketing Associations—a. Origin and Purpose. Under express statutory authority, co-operative marketing associations composed of the growers or producers of agricultural or fructicultural products are now to be found in many of the states and in every section of the country, and their origin and growth, it has been well said, is founded upon a pressing economic necessity. The purpose of this legislation is by combination of the producers to obtain for them a fair and reasonable price for their products without increasing the cost to the consumer, but rather to reduce the price for the benefit of the consumer. And the methods contemplated to obtain this result are: (1) To eliminate wasteful and expensive methods of marketing, which result in an unconscionable spread between what is paid the producer and what is charged the consumer, by making the distribution of agricultural products between producers and consumers as direct as can efficiently be done, and minimizing the expense of the middleman. (2) To protect the producer against combination of buyers to depress the price paid him—that is, to prevent artificially forced reduction in price—and also to prevent the combination from increasing the price to the consumer. (3) To create new markets by studying market problems from the standpoint of the consumer. (4) To create a greater demand for farm products, by furnishing the consumer a regular supply at a lower price. (5) By use of a rational method of putting the products on the market

from time to time when there is a legitimate demand therefor, to prevent a supply greater than the demand, and thus prevent flooding the market, and by the extension of credit to producers to enable this to be done.

b. Validity of Statutes Authorizing Associations. While state legislatures may not enact laws authorizing associations to cause artificial scarcity of necessaries or commodities of trade, or unreasonably increase their cost to the consumer, the validity of statutes organizing co-operative marketing associations has been uniformly upheld as against objections that they were in violation of federal or state anti-trust legislation; and their validity has also been upheld as against objections that they were in violation of organic laws of the state, or of the equal protection clause, or of the due process clause of the federal constitution. These statutes merely protect the producer against oppression and constitute a reasonable restraint not injurious to public interest."

A-3. *The Laws of the United States Specifically Authorize Co-operative Associations of the Character of Defendant in Error.*

In three major federal laws Congress has given national legislative sanction to co-operative marketing associations conforming to legal requirements, and has provided that such associations shall not be considered as illegal combinations under the Anti-Trust Laws.

The power of Congress to enact such laws cannot be questioned. The Anti-Trust Law is a declaration of public policy and Congress, which has power to enact such law, has power to change it and to determine its scope. Otherwise, we would be placing Congressional declarations of public policy upon as high a throne as the Constitution.

The first federal law is known as the Clayton Act of

October 15, 1914, Chapter 323, Section 6, 38 Stat. 731, U. S. Complied Stat., Section 8835-F. This section reads:

> "That the labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

The defendant in error is organized and operating in conformity with the requirements of the Clayton Act.

It is an agricultural organization.

It is instituted for the purpose of mutual help.

It does not have capital stock.

It is not conducted for profit.

Congress has said that the Anti-Trust Law shall not be construed to forbid either the existence or operation of such an organization, nor shall such laws be construed to restrain the members of such an organization from carrying out its lawful objects.

The validity of this section is not questioned.

This section conclusively answers the claim made by the plaintiff in error in its pleading that the Co-operative Marketing Act of Kentucky violates the Sherman Anti-Trust Law.

Eight years later, Congress enacted the *Capper-Volstead Act*, which expressly validates and legalizes such associations as the defendant. This act was passed

February 18, 1922, and is found in 42 Stat. 388, c. 57, Sec. 1; Sec. 8716½, U. S. Comp. Stat.

This Act provides in part that:

"Persons engaged in the production of agricultural products as farmers, planters, ranchman, dairymen, nut or fruit growers may act together in associations, corporate or otherwise, with or without capital stock, in collectively processing, preparing for market, handling, and marketing in interstate and foreign commerce, such products of persons so engaged. Such associations may have marketing agencies in common; and such associations and their members may make the necessary contracts and agreements to effect such purposes; Provided, however, that such associations are operated for the mutual benefit of the members thereof, as such producers, and conform to one or both of the following requirements:

First. That no member of the association is allowed more than one vote because of the amount of stock or membership capital he may own therein, or

Second. That the association does not pay dividends on stock or membership capital in excess of 8 per centum per annum.

And in any case to the following:

Third. That the association shall not deal in the products of non-members to an amount greater in value than such as are handled by it for members."

This act further provides that the Secretary of Agriculture of the United States is authorized to investigate any complaints against the conduct of such co-operative marketing associations and to take such action as may be necessary to prevent any undue enhancement of prices by such associations. In this manner an effective safeguard is provided to prevent any unfair increase in prices or other improper practices as the result of the co-operative organizations sanctioned by Federal Law.

It is important to note that the defendant Association

in its organization complies with every condition of t
Capper-Volstead Act.

First, no member of the Association is allowed mo
than one vote because of his membership therein;

Second, the Association does not pay dividends
stock or membership capital in excess of 8 per cent; a

Third, the Association does not deal in the produc
of non-members to any extent.

The Capper-Volstead Act specifically permits farme
to "act together in associations."

It permits such associations to collectively proce
handle and market in interstate and foreign commer
the products of such farmers.

It permits common marketing agencies.

It specifically permits a marketing contract betwe
the co-operative association and its members similar
the one complained of in the present case, provided su
associations comply with the conditions of the Act.

The Capper-Volstead Act goes beyond a legalizati
of co-operative marketing associations and provides
remedy for any abuse of the privilege or sanction grant
such associations by law.

Under this Act any complaint against the defenda
in error on account of undue enhancement of prices
improper practices could and should have been p
sented to the Secretary of Agriculture of the Unit
States. It is not claimed that any complaint against t
defendant in error was presented to the United Stat
Department of Agriculture.

Since the plaintiff in error claims that the defendant
error is engaged in interstate commerce, the matte
complained of would be within the jurisdiction of t
United States Department of Agriculture. Congre

having acted with reference to this field of legislation, its action is necessarily conclusive and it was incumbent upon the plaintiff in error to exhaust his remedy under the federal law before resorting to the state courts.

There is no showing of any attempt to exhaust the remedies granted plaintiff in error under the federal law. No complaint has been lodged with the United States Department of Agriculture, and no orders have been issued by the Secretary of Agriculture against the defendant Association.

On the contrary, all reports and investigations which the government of the United States has made through its Department of Agriculture have commented favorably upon the conduct of the Burley Tobacco Growers Co-operative Association and upon its benefits and the advantages to the farmers of the states in which it operates. (Preliminary Report on "Co-operative Marketing of Burley Tobacco" U. S. Dept. of Agriculture, July, 1926).

The third major federal legislation declaring the public policy of the government of the United States to promote co-operative marketing is known as the *Haugen Bill* or the "*Co-operative Marketing Act of* 1926." This Act was adopted July 2, 1926. It is entitled, "An Act to create a division of co-operative marketing in the Department of Agriculture; to provide for the acquisition and dissemination of information pertaining to co-operation; to provide for calling advisers to counsel with the Secretary of Agriculture on co-operative activities; to authorize co-operative associations to acquire, interpret, and disseminate crop and market information, and for other purposes." July 2, 1926, c. 720, Sec. 1, 44 Stat; Secs. 795aa 3 to 9, inclusive U. S. Comp. Stat., Pamphlet Supplement August, 1926).

Section 2 of this act directs the establishment of a Division of Co-operative Marketing in the Bureau of Agricultural Economics of the Department of Agriculture and places such division under the direction and supervision of the Secretary of Agriculture.

Section 3 of the act provides the duties of such Association: • • •

> "(6) To promote the knowledge of co-operative principles and practices and to co-operate, in promoting such knowledge, with educational and marketing agencies, co-operative associations, and others. • • •
>
> (7) To make such special studies, in the United States and foreign countries, and to acquire and disseminate such information and findings as may be useful in the development and practice of co-operation."

Section 5 of this act specifically authorizes co-operative marketing associations to distribute information to their members concerning crops, markets, production and possible over-production. This section reads:

> "Persons engaged, as original producers of agricultural products, such as farmers, planters, ranchmen, dairymen, nut or fruit growers, acting together in associations, corporate or otherwise, in collectively processing, preparing for market, handling, and marketing in interstate and (or) foreign commerce such products of persons so engaged, may acquire, exchange, interpret, and disseminate past, present and prospective crop, market, statistical, economic and other similar information by direct exchange between such persons, and (or) such associations or federations thereof, and (or) by and through a common agent created or selected by them."

Section 6 appropriates a sum of $225,000 for the purpose of aiding co-operative marketing in the manner outlined in the Act.

This legislation establishes the public policy of the United States to promote co-operative marketing associations of the type represented by the defendant in error.

If there were any doubt as to the interpretation of the Sherman Anti-Trust Law in connection with its application to co-operative associations of farmers, that doubt is removed by the Clayton Act of 1914, Capper-Volstead Act of 1922 and the Haugen Act of 1926.

If there were any conflict between the Sherman Law and these later laws, it is clear that the later laws must prevail as the last expression of National Policy. In addition to these laws, Congress has further evidenced the public policy of the nation to encourage and promote the formation of co-operative associations like the Burley Association.

Acts have been passed enabling the War Finance Corporation to make advances "to any co-operative association of producers in the United States which may have made advances for agricultural purposes." (April 5, 1918, c. 45, Sec. 4, added August 24, 1921, c. 80, Sec. 3, 42 Stat., 182; Sec. 3115-4-5k (4) U. S. Comp. Stat. Comp. Ed. 1925 Supplement). Such associations are exempted from the payment of income taxes by an exemption applicable to "farmers, fruit growers or like associations organized and operating as sales agents for the purpose of marketing the products of members and turning back to them the proceeds of sales less the necessary selling expenses on the basis of the quantity of produce furnished by them." (Par. 11, c. 234, Sec. 231, 43 Stat. 282, June 2, 1924, U. S. Comp. Stat. 1925, 6336-1-6nn). Such associations have been granted the privilege of membership in grain exchanges, etc. (Par. (e), c. 369, Sec. 5, 42 Stat. 1000, Sept. 1, 1922, U. S. Comp. Stat. 1925, Sec. 8747-4-5d).

The above legislation shows that there is a complet agreement of national and state policy with respect t the encouragement of co-operative marketing amon farmers and that the Burley Association is carrying ou a service to agriculture expressly sanctioned, urged an regulated by law.

In face of this legislation we submit there is no lega merit to the claim that the Co-operative Marketing Ac of Kentucky conflicts with the Anti-Trust laws of th United States or that the defendant association violate such laws; and that the court below had not erred i striking such claim from the pleadings.

A-4. *The Appellate Courts of Kentucky, Ohio, Ten nessee and Indiana have specifically found that defend ant in error is not organized or operating in violation o the Anti-Trust Laws of the United States or of suc States.*

We do not contend that a lawfully formed and or ganized association may not be guilty of illegal and un lawful acts. Our position is that it is not claimed o shown that defendant in error has, by conduct or ac tion, done any act except to carry out its contracts an to perform the functions authorized by law.

It was claimed in other cases that the Association ha been guilty of such conduct. That question was trie out upon its merits in Ohio and in Tennessee, and th courts in both states found upon the evidence that th operation and the activities of defendant in error in creased the production of Burley tobacco; enabled it sale at a better price for the farmer and at a lower pric for the consumer, and enabled the manufacturer to in crease his earnings and profits.

These courts found upon a full and complete recor

that the work of the Association is an economic necessity and that it contributed to the advancement of the public welfare.

The first of these cases to which we invite the attention of the court is *List* v. *Burley Tobacco Growers Co-operative Association* (1926), 104 O. S. 361, 151 N. E. 471.

In the *List* case, a certain grower member of the Burley Tobacco Growers Co-operative Association who had violated his contract employed able counsel, namely the Honorable Judson Harmon, former Attorney General of the United States, to raise the issue that the Burley Tobacco Growers Co-operative Association and the Bingham Co-operative Marketing Act of Kentucky violated both the Valentine Anti-Trust Law of Ohio and the Sherman Anti-Trust Law of the United States. This question was heard upon its merits by the Trial Court and considerable testimony was taken upon that precise point.

After hearing the evidence, the Trial Court found that the Bingham Act and the Burley Tobacco Growers Co-operative Association did not violate either the Valentine Anti-Trust Law or the Sherman Anti-Trust Law.

This decision was affirmed by the Court of Appeals and in turn by the Supreme Court of Ohio.

The decision of the Supreme Court of Ohio in the *List* case is notable because of its recognition of the economic fact that competition is not always beneficial and that the kind of competition which results when farmers blindly dump their crop upon the market may be disastrous and ruinous to the public welfare. In so holding, the court said:

> "Other cases of the United States Supreme Court and courts of last resort of the states of the Union

where anti-trust laws prevail might be cited in large numbers showing that the trend, if not the universal pronouncement, is toward liberality and greater tolerance of co-operation in commerce and industry. The administrative forces of the federal government are more kindly disposed toward combinations than ever before, and are even encouraging combinations whose tendencies do not appear to be detrimental to the public welfare. The established interpretation of modern anti-trust legislation is that such laws are declaratory of the common law, and are enacted to provide the machinery for preventing the abuses of combination and co-operation and for penalizing and punishing those transactions which by the settled principles of the common law are declared to be unlawful. The transactions which are forbidden include agreements to restrict production for the sole purpose of enhancing price, stifling competition, or creating a 'corner,' fixing prices at a definite standard, or combining in a manner that has a necessary tendency to oppress competitors or the public. *On the other hand, it is recognized that competition may be reasonable or unreasonable. It may promote sound and sane relations between supply and demand, or it may ruinously place producers at the mercy of consumers and middlemen. Combinations formed to prevent disastrous competition have never been condemned unless unlawful means were employed.*" (Italics ours.)

The court then takes up the evidence and shows from the testimony of the witnesses that the operations of the defendant in error have been in strict conformity with law:

"The instant case was tried upon the issues raised by the eighth defense of the amended answer, which charges that the purpose of this co-operative association was to bind the signers, including the defendant, to agree in a manner to keep the price of tobacco at a fixed and graduated figure, so as to preclude a free and unrestricted competition among themselves, purchasers, and consumers. It was declared by the trial court that the defendant had

failed to establish that defense. *Testimony of witnesses has already been quoted in this opinion, and it has already been shown, in which we agree with the trial court, that the testimony does not show that any unfair methods were employed in the marketing of tobacco, or that the methods which were in fact employed were calculated to injuriously affect trade and commerce, or to increase the cost of the finished product to the consumer. There has been no effort to crush or oppress other producers of tobacco; nor does the evidence tend to show any agreement to limit or reduce production.* It is true that the association carried on certain educational work, and freely advised its members as to marketing conditions and the supply and demand in the tobacco industry, and even advised the growers to grow less tobacco and employ their lands in raising alfalfa and other forage producing and soil-building crops. *Such efforts on the part of the association differed in no wise from the efforts of the federal Department of Agriculture, but, on the contrary, coincide perfectly with the efforts of the federal Secretary of Agriculture in all agricultural lines.* The bulletins issued by the federal department show wide fluctuations in the volume of agritultural products, and it is the purpose of the department to try to bring about a more even and uniform production of all such products. Nothing is so conducive to speculation as the fluctuation of production, and nothing is so well calculated to promote normal relations between the producer and the consumer as a regular supply of products in accordance with a normal demand for same. Nothing is better calculated to shorten the distance between the producer and the consumer. There has been a consistent effort on the part of our federal government for the last 50 years to bring it about that the country may become as nearly self-sustaining as possible. A failure to accomplish this laudable purpose must lead to dependence upon a foreign food supply and to dissatisfaction and consternation among our agricultural producers. The American government and the American people are committed to the maintenancee of a resourceful, independent

agriculture, and it should be the effort of all the branches of our government to aid agriculture in maintaining its proper place in our economic structure, on equal terms with all other producing groups. Information upon the subject of agricultural production is necessary to the American farmer in helping him to plan his annual crops, and upon no sound theory can it be claimed that this information amounts to an unlawful restraint of trade." (Italics ours.)

The court refers to the economic impossibility of establishing a fixed standard of prices and after citing past experience, says:

"There are too many independent producers to permit such a plan to be successfully carried out, and this fact has been demonstrated by the constantly increasing production of Burley tobacco from year to year since the organization of this association. The government reports clearly indicate that this co-operative effort is stimulating increased production, and the reason is not far to seek. The mere fact of stabilizing marketing conditions has inevitably caused a steadier market and an increased production."

The court answers the claim that a monopoly exists in the sale of Burley tobacco as follows:

"Anti-trust legislation is aimed to prevent monopoly. A monopoly in general means the concentration of business in the hands of a few, or a combination for the purpose of raising or controlling prices. Applying this definition to the instant case, it is apparent that the business of raising tobacco has not been concentrated into the hands of a few persons. More than 100,000 growers are in the pool, but one-fourth of all the growers are outside of the pool, and it is apparent that those who are outside are getting as good prices for their product as those who are within the pool. It is apparent that the pool is not able to control prices. The census shows that there are more than 6,000,000 farmers in the United States, and it is manifestly impossible to 'corner' any branch of agricultural production. The

number of growers of Burley tobacco is not made to appear in this record, but it is indicated that there are only 4 manufacturers of any consequence. Whether or not there is a larger number than 4 is not material, because it is quite certain that the number of manufacturers of Burley tobacco is quite limited and the number of growers is quite large."

The conclusion of the Supreme Court of Ohio from a full consideration of the facts is tersely expressed in these words:

"This controversy involves a legal problem, but the legal problem cannot be entirely divorced from the economic problem. It is not a question of control, but of reasonable regulation. There is no purpose to monopolize, but rather a purpose to stabilize, the production and marketing of Burley tobacco. We therefore agree with the trial court that there is no evidence of price fixing or other unlawful manipulation of normal conditions of supply and demand."

In the State of Tennessee, the Attorney General, at the instance of certain middlemen conducting a loose leaf auction warehouse, commenced an action against this defendant in error to oust it from the State of Tennessee, on the ground that the Association was a trust or monopoly in restraint of trade, contrary to the State and Federal Anti-trust laws. This action is entitled *State of Tennessee ex rel Thompson, Attorney General, v. Burley Tobacco Growers Co-operative Association*, Court of Appeals of Tennessee, Eastern Section. Writ of certiorari denied and Court of Appeals opinion affirmed by Supreme Court of Tennessee, January 15, 1927. The opinion has not yet been *officially* reported; but relevant extracts from the opinion are printed below. The case was fully heard upon a voluminous record containing the evidence as to the facts in connection with the operation and activities of defendant in error. Upon this complete record, the Court of Appeals

of Tennessee, in a unanimous opinion, held that the Burley Tobacco Growers Co-operative Association did not violate either the State or Federal Anti-trust laws. In so holding, the court said, in part:

> "An examination of the charter of incorporation of the defendant Burley Tobacco Growers' Association, shows that its purposes are consistent with those of the Statute of Tennessee. A contract essentially identical with its uniform contract with the growers was declared in the Mason (150 Tenn. 258) and Dunn (150 Tenn. 614) cases to be valid and enforceable. So long as the Association commits no act detrimental to the public welfare it is a lawful organization and its contracts with producers are not subject to attack. In the Dunn case it was held that the Federal Anti-Trust Statute is directed against monopoly and not against expectation of it. The court applied to the Association in that case, the Dark Tobacco Growers' Co-operative Association, the presumption that the parties, by entering the combination and by execution of the contracts, intended only to enter into such engagements as were lawful, and that such contract should in the absence of allegations and proof to the contrary, be construed as limited to lawful purposes under the statutes and the constitution."

The court then examined the facts to see whether there had been any abuse of the power granted by the Co-operative Marketing Act so as to create an actual unreasonable restraint of trade; and said:

> "We hold in the first place that upon the face of the charter, by-laws and marketing agreements of this Association they are not illegally monopolistic. This proposition has already been settled by the Supreme Court in the Mason and Dunn cases. There is nothing in the agreement requiring members to limit production. They are not obliged to raise tobacco at all after they join the Association. Upon the face of it the Association is in effect a selling agency, with the middleman eliminated. A mere selling agency is not a monopoly and neither the

common law nor the anti-trust statute applies to a genuine sales agency. *Brown* v. *Staple Co-operative Association* (Miss.) 96 Sou., 849.

"The co-operative marketing system was forced into existence to guarantee fair prices to the producer, a fair wage for the labor, and to prevent extortion upon the consumer. It has increased consumption by furnishing the consumer a regular supply and at the same time enabled the laborer and the farmer to obtain a remunerative return. It does not appear from the cases that the price to the consumer has been increased beyond the real value of the product. It has been repeatedly held that the expressed purpose of stabilization of the market of an agricultural product is not monopolistic or in undue restraint of trade. Stabilization is for the purpose of preventing heavy or serious fluctuations, and maintaining an orderly state of the market so that a fair price above the actual cost of production may be maintained at a somewhat fixed and graduated figure. It involves sufficient control of the supply to prevent dumping of the products on the market in such quantities and at such times as would unreasonably depress the price. It even requires at times carrying over at least a part of a crop until a later time so that in an orderly way and at a fair price the supply may be absorbed by the demand. The products are pooled in the hands of the Co-operative Marketing Association to sell them from time to time under such demand as will bring reasonable prices. In the tobacco industry, as was pointed out by the United States Supreme Court in *International Harvesting Co.* v. *Kentucky*, 234 U. S. 216, 58 L. ed. 1284, combinations of tobacco growers are held to be no more than methods to restore an equilibrium that has been disturbed by a combination of buyers. The proof in this record is that there are only four principal buyers, and they were the constitutents of the American Tobacco Company, known as the Tobacco Trust, before it was dissolved by the United States Supreme Court."

In reciting the history of the Burley Association, the court points out how the Association has helped all ele-

ments except the speculator and middleman. Upon this point, the opinion reads:

> "It is said by Judge Bingham, in his testimony, that the effect of the work of the Association was to lead from bankruptcy to prosperity. He also testified that since the Association has been organized and has raised the price of tobacco, the price of the manufactured product has gone down, but the reports show that the manufacturers have been able to make a good profit. The weight of the evidence seems to sustain this conclusion. This being true, the charge in the bill in this cause that the effect of the work of the Association is to raise the price to the consumer, is not sustained. It may not be entirely due to the work of the Association, but the elimination of the middleman and other economic wastes ought certainly to have a tendency to reduce the price to the consumer, although the price to the grower has increased. Judge Bingham also testified that it had never been the purpose or intention of the Association, or its managing officers, to limit the production of Burley tobacco in Kentucky, that any attempt of that kind would defeat the purpose of the Association to market the tobacco in such an orderly way as to get a fair price for it; and that if the Association should attempt to get an unfair price its whole purpose would be defeated. He further testified that the Association had put forth every effort to improve the quality of the tobacco. As he was the principal organizer, without whose assistance the organization would have doubtless been impossible, he is one of the principal persons who are charged in this cause with having sinister motives. When asked if he had personally profited directly or indirectly in any respect by the organization and operation of the Association, he said that he had not except that he had the pleasure of seeing a great many thousands of people benefited."

Upon the same point the court referred again to the evidence in its opinion, as follows:

> "It appears that the price of Burley tobacco for the 1920 and 1921 crops, together, averaged 13.37 cents per pound. The cost of raising tobacco is

about twenty cents per pound. Under the operations of the Association the growers have received twenty-two cents to twenty-eight cents per pound. *Mr. Stone testified that following the organization of the Association and after the year* 1923, *the production was doubled*, and the *prices to the consumer have decreased probably twenty to twenty-five per cent;* and yet that in the past three years the *manufacturers have had in earnings at least from twenty to twenty-five per cent more than they received before the Association came into existence.* It was estimated by Judge Bingham that *during its first year of operation the Association did* $50,000,000 *worth of business and increased the profits of its members by* $40,000,000. It further appears that there was a very rapid increase in acreage of Burley tobacco in Tennessee from 1920 to 1924. There is much testimony in behalf of the relator that the work of the Association in Tennessee had reduced or would reduce the acreage, but the official report of the agricultural statistician of the Department of Agriculture for Tennessee shows that in 1924, there was upon the whole an increase in acreage of Burley tobacco in the counties in which it is grown in Tennessee, excepting one, and the testimony shows that in this, the county of Sumner, the reduction was due in part to a severe drought." (Italics ours.)

The court dismisses the claim that the farmer who did not belong to the Association was prejudiced by its existence and pointed out that on the contrary he was benefited by being able to secure a better market price without contributing to the expenses of the Association.

The court said:

"The non-members may be profiting heavily by the very existence and operation of the Association. The production of Burley tobacco was increasing everywhere, as shown by the report of the investigators. It might be very natural for a tobacco grower to conclude that it would be to his interest to stay out of the Association and receive the purchase price at an excellent figure in cash in the loose-leaf warehouses; but if the market were not

stabilized and if all the growers forced their tobacco upon the market at the same time under such an individualistic system, by the operation of the law of supply and demand, the market might be again in a state of collapse. This is the very philosophy of the co-operative marketing system. The charge that the Tennessee grower is prejudiced under such circumstances may spring from but a single viewpoint and not from a full consideration of the operation of well known economic laws."

Upon the point that the business of the middleman was injuriously affected, the court said:

"If the effect of the Co-operative Marketing System is to diminish the business of proprietors of loose-leaf warehouses, but not to the disadvantage of the growers, it is but a natural effect of change in economic methods and an incident to methods in themselves competitive. It is for the grower to determine which method he will adopt for marketing his produce. The judicial process should not be applied in behalf of those who would invoke it for business advantage where the general public, and consumers of products, do not suffer from what is complained of."

The conclusion of the court is expressed in the following words:

"Upon a careful consideration of all the facts presented in the large record in this cause, we are unable to agree with the conclusions of law or fact reached by the Chancellor as grounds for sustaining the bill in this cause. We do not think that the Association in question has practiced unreasonable restraint of trade, fraudulent rivalry or coercion, illegal suppression of competition, undue limitation of production, impairment of quality, decreasing wages or price of materials; or that it is manifest that such will be the probable effect of the operation of the Association."

For the above reasons the bill brought by the Attorney General was dismissed and the defendant in error was permitted to carry on its business in the State of Tennessee.

In *Indiana*, the same question arose upon the pleadings; and the Court of Appeals of Indiana, in a decision rendered prior to the above quoted decisions in Ohio and Tennessee, held that the Burley Tobacco Growers Co-operative Association did not violate the State or Federal Anti-Trust Laws.

The Indiana decision is reported in *Burley Tobacco Growers Co-operative Association* v. *Rogers* (1926) 150 N. E. 384. In holding the defendant in error is not in violation of the trust laws, the court distinguished *Reeves* v. *Decorah Farmers Co-operative Society* 160 Ia. 194; 140 N. W. 844, which has since been practically overruled in *Clear Lake Live Stock Shippers Association* v. *Weir* (1925) Iowa 206 N. W. 297 and *Baldwin County Producers Association* v. *Frishkorn* 17 Ala. App. 84; 81 So. 862, which has since been reversed by the Supreme Court in *Ex parte Baldwin County Producers Association* (1919) 203 Ala. 345; 83 So. 69 and *Warren* v. *Alabama Farm Bureau Cotton Association* (1925) Ala. 104 So. 264. The court then said:

> "When the courts of every state, where the validity of statutes authorizing the organization of co-operative marketing associations, or the co-operative marketing contracts between such associations and their members has been assailed, have held such organizations and contracts legal, it would seem that the validity of such legislation and contracts was no longer an open question. Such organizations and contracts have been upheld by the courts of Alabama, California, Colorado, Kansas, Minnesota, Kentucky, Mississippi, Nebraska, New York, North Carolina, Tennessee, Texas, Washington and Wisconsin.
>
> For a further discussion of this question, see the Robertson Case, where we held that a similar contract was not illegal on the ground that it was in restraint of trade. On the authority of that case, we hold the court erred in overruling the demurrer to the sixth paragraph of answer."

The complete citation of the *Robertson case* referred to above is *Dark Tobacco Growers Co-operative Association* v. *Robertson* (1926) Ind. 150 N. E. Rep. 106.

That case involved the question of whether the Dark Tobacco Growers Co-operative Association, another co-operative association organized under the Bingham Co-operative Marketing Act and similar in structure to the defendant in error, violated the Anti-Trust Laws.

The court said that the contention that the Co-operative Association violated the Anti-Trust Laws of the State and Nation was entitled to more than passing notice. Then, after quoting from some of the decided cases, the court said that the Co-operative was a selling organization and not a holding organization. Upon this point the opinion reads:

> "It it also to be noted that there is nothing disclosed by the complaint, contemplating or authorizing the holding of the products of the members of appellant from the market. The life of the contract was five years, and any attempt to hold the members' products off the market would be destructive of the very purposes of the association, and, if attempted, would force the sale in the second year of two years' crop, which would be destructive of the organization and bring ruin to its members."

The court then takes up the operations and activities of the Association and says:

> "What has appellant done that can be said to be in restraint of trade? It has neither coerced nor suppressed any competition. It has not arbitrarily fixed or maintained prices. It has not been guilty of unfair or fraudulent rivalry. It has not limited production or created an artificial scarcity. It has not impaired quality. It has not decreased wages or the price of materials. The fact that it is large and powerful does not render it an unlawful combination or trust, as mere size and possibility of oppression or other illegal act does not even tend to

prove the illegality of a corporation. *United States* v. *United States Steel Corporation*, 251 U. S. 417, 40 S. Ct. 293, 64 L. ed. 343, 8 A. L. R. 1121."

The question of whether the Bingham Act conflicted with the Anti-Trust Laws was first raised in Kentucky and it was definitely decided that there was no conflict. The question came before the Kentucky Court of Appeals in *Potter* v. *Dark Tobacco Growers Co-op. Ass'n* (1923) 201 Ky. 441; 257 S. W. 33. That case involved the Dark Tobacco Growers Co-operative Association organized under the Bingham Act and identical in structure with the Burley Tobacco Growers Co-operative Association.

The court pointed out that there was no proof that a monopoly had been created or that trade had been restrained and that the Bingham Act and the Clayton Act are expressive "of a change in the public attitude and policy toward agricultural and horticultural pursuits in relation to other business activities, and a recognition of a necessity for the public welfare of permitting organization among such citizens to enable them to meet justly and without undue advantage the conditions they encounter in necessary trade relations with other citizens, or rather groups."

The court then discusses the necessity for combination among farmers to prevent economic disaster and concludes as follows:

> "We therefore hold that the Act is valid, and that the appellant's contract with appellee does not by itself, nor when considered in connection with other like contracts, violate the Sherman Anti-trust Act as amended."

The Potter case was not carried to this court; and the decision therein became final. It has been consistently followed in Kentucky and has been uniformly cited with approval in other states.

The question of whether the Bingham Act or the
fendant Association violate the Anti-Trust Law
again put before the Court of Appeals in the case at
in which it was sought to escape from the effect of
Potter decision because of the statement that there
neither allegation nor proof of monopoly in that c
However, the court said that the Potter opinion was
based wholly upon the absence of proof but that
was referred to as a strengthening argument.
court then says:

> "Both in that case and in this one the validity
> the act as well as all of its sections was and is
> be tested by the power and authority conferred u
> plaintiff by the terms of the act itself, since it
> not claimed in that case, nor in this one, that pla
> tiff was doing or intended to do anything beyo
> the power conferred upon it by the statute. In ot
> words, neither in the Potter Case nor in this one
> the constitutionality of the act or any of its secti
> contested because of an unconstitutional administ
> tion of its provisions, but only because the pro
> sions themselves were unconstitutional. It is the
> fore patent that the Potter opinion, if we are to
> here to it, is not in the least destroyed as an
> thority herein because of the reason urged by
> fendant. * * *
>
> We may add to what was said in that opinion t
> there is no statute at present in this state, nor
> there any when the cause of action herein ar
> against pools, trusts, and monopolies, and by
> Clayton Amendment to the Sherman Anti-Trust
> (38 Stat. 730) agricultural products were expres
> excluded from that act; which left, as the only
> against such combinations, the common law, p
> vided it prevailed in this state as to agricultu
> products after the enactment of the Bingham
> It is, however, conceded that it is competent fo
> Legislature to repeal the common law prevailing
> the jurisdiction where it sits, the same as it may
> peal a prior statutory enactment, and section 2
> the Bingham Act expressly provides that the

ganization of the co-operative marketing companies provided for by it shall not be deemed 'to be a conspiracy nor a combination in restraint of trade nor an illegal monopoly; nor an attempt to lessen competition or to fix prices arbitrarily or to create a combination or pool in violation of any law of this state.' It is then provided in the same section that—

'The marketing contracts and agreements between the association and its members and any agreements authorized in this act shall be considered not to be illegal nor in restraint of trade,' etc.

It would therefore seem that section 28 of the act expressly repealed any rule of the common law that might prevail in this state militating against the legality of such contracts. However, if it should be contended that such a provision was itself unconstitutional, it could only be so held upon the ground that it was an unwarranted classification which the Potter opinion, and many others we might cite, held was untrue."

Thus, in every one of the principal Burley tobacco producing states of the Union where the Burley Association is engaged in business and where the question has been raised, namely, Kentucky, Ohio, Indiana and Tennessee, it has been definitely decided as a question of fact and of law that the Bingham Act does not conflict with or violate either the common law or the statute law of the state or Nation against trusts and monopolies.

In each of these states it has been determined, not only as a matter of law, but as a question of fact that the Burley Tobacco Growers Co-operative Association has not been guilty of any unreasonable restraint of trade and has not done any overt act in violation of the common law or statute law of the state and Nation with respect to trusts and monopolies.

Nowhere in the pleading of the plaintiff in error is there any allegation which takes the present case out of the rule of the foregoing cases.

We urge that no reason is presented why this court should disturb the findings of the courts of Kentucky, Ohio, Indiana and Tennessee with respect to the defendant in error.

A-5. *All Courts Uniformly Hold That Co-operative Marketing Acts and Associations Organized Thereunder Do Not Violate The Anti-Trust Laws.*

This precise question has been determined in so many states that the law may be considered settled.

In every state the Co-operative Marketing Act and associations organized thereunder have been sustained as against the claim that they violate the Anti-Trust Laws of the State or Nation.

In every state, the distinction between co-operative associations and financial or industrial combinations in restraint of trade has been recognized.

The established law is clearly stated in the recent volume of Corpus Juris on Monopolis, 41 Corp. Juris, page 167, as follows:

> "§162.c. *Lawfulness of Associations.* Co-operative ative associations organized under such statutes have uniformly been held lawful combinations and not in restraint of trade and not monopolies in the sale of the products handled by them, and therefore not within the condemnation of state constitutional provisions or of state anti-trust acts, aimed at combinations in restraint of trade and monopolies. And the fact that a co-operative marketing association is large and powerful, and may sometimes be guilty of coercion or suppression of competitors, arbitrary fixing, and maintenance of prices, or other acts making combinations illegal, does not render it an unlawful combination or trust.
>
> *Not analogous to combinations in restraint of trade or monopolies.* An orderly, systematized, co-operative marketing association authorized by law, to prevent a sacrifice of the farmers' products

and to realize a reasonable profit, has no analogy to financial combinations in restraint of trade, which have at times tended to prevent the farmers from realizing a fair profit and a decent living, or to a combination of a few or many financially able men or corporations who are able to get together and dominate and control a particular industry and the prices of its product. On the other hand these associations are closely analogous to labor unions in so far as their purpose is to oppose depression of prices of farm products by powerful combinations of buyers organized for that express purpose; and by parity of reasoning no valid grounds exist for denying the right of farmers to organize into associations to protect themselves against organized efforts of powerful combinations to depress the price of their products, the reasons advanced in support of the lawfulness of labor unions applying with equal force to sustain the lawfulness of co-operative marketing associations; and it has been held, and with good reason, that such a combination has more tendency to avoid monopolies by others than it does to create a monopoly by the limited numbers of farmers who will join it.

§ 163. d. *Lawfulness of Contracts between Association and Members.* It has very generally been held that contracts between co-operative marketing associations and their members by which the latter agree to deliver all or a certain proportion of the products or commodities grown or produced by them during a fixed period to the association to be sold for their benefit by the association, and providing for liquidated damages in a reasonable amount in case of a breach of the contracts, are valid at common law as not being in restraint of trade or as creating or tending to create a monopoly, and also not in violation of the Federal Anti-Trust Act, especially in view of the Clayton Act treating farmers as a distinct class, or of the state anti-trust acts. The fixing of liquidated damages in a certain amount, it is said, is justified by the difficulty of making anything like an accurate estimate of the damages sustained by the association by reason of a breach of the contract. However, if the purpose

225

of the contract is to secure greater prices tha
products are worth, they are invalid, and wit
binding force even against one who entered in
voluntarily. So also a contract would be inval
its purpose was to injure the public interes
creating a scarcity of products. However, it wi
presumed that these contracts are legal in the
sence of evidence that the purpose is to pro
prices beyond the real value of the product,
their validity will be upheld in the absence of
evidence to this effect."

For the convenience of the court, we have arrang
partial list of the cases supporting the above text
states, in alphabetical order:

ALABAMA

Warren v. *Alabama Farm Bureau Cotton Associa*
(1925) Ala. 104 So. 264. In this case the court answ
the question of whether the cost of cotton to the custo
was unreasonably increased by co-operative actio
contrast to independent and individual action, as foll

"Co-operative Marketing Associations, comp
of the growers of agricultural or fruticultural
ducts, are now to be found in many of the st
and in every section of the country. Their o
and growth are unquestionably founded upon a p
ising economic necessity."

The court quoted at length from the opinion in
Jones case (185 N. C. 265) and the *Brown case* (132 N
859) and continued:

"We do not overlook the fact that the cons
tional provisions inhibiting trusts and monop
in the states of North Carolina and Mississippi,
not indentical with ours; but very clearly nei
of the decisions above referred to is grounded
that distinction, but very clearly upon the prin
that reasonable restraint of trade, looking to
reasonable protection of individual interests, and

unduly detrimental to the public interest, is not obnoxious to the law as it is now written and understood.

• • • • •

"So far as we are advised, no American court has condemned a co-operative marketing contract of the character of this complainant association as injurious to the public interest, or in any way violative of public policy. On the contrary, such contracts have been everywhere upheld as valid, if not positively beneficial to the public interest.

• • • • •

"Our conclusion is that the contract here exhibited is authorized by the act referred to, and that the act itself is not offensive to section 103 of the Constitution; and that therefore the demurrer to the bill was properly overruled."

California

The California cases are particularly important because of the well-known success of co-operative marketing in that state. The farmers and orchardists of California through their co-operative associations have made their products known throughout the world under such widely advertised brands as "Sunkist Oranges" (California Fruit Growers Exchange) "Sunmaid Raisins" (California Raisin Growers Association) and "Sunsweet Prunes" (California Prune and Apricot Growers Association.)

The most recent California decision was delivered in a case involving the California Bean Growers Association and is entitled *California Bean Growers Association* v. *Rindge Land & Navigation Company* (1926) Cal. 248 Pac. Rep. 658. In that case a unanimous Supreme Court briefly dismissed the claim that the Association was an unlawful trust, in the following words:

"The contentions that the agreements between the association and its members create an unlawful

trust or combination in restraint of trade, and that the stipulation in the agreement for liquidated damages is invalid, are sufficiently answered contrary to appellant's contentions in the decisions first cited in this opinion."

The cases referred to are *Anaheim Citrus Fruit Ass'n* v. *Yeoman* (1921) 51 Cal. App. 759; 197 Pac. 959 and *Poultry Producers of Southern Cal.* v. *Barlow* (1922) 189 Cal. 278; 208 Pac. 93.

In the *Anaheim* fruit association case, the court held that a co-operative association organized in accordance with the Co-operative Marketing Law of California did not violate the Anti-Trust Laws. In so holding, the court said:

> "There is nothing in the articles of incorporation of the plaintiff or its by-laws, or in the evidence of its methods, which tends to show that any purpose of the association was to do acts in restraint of trade or produce an unlawful monopoly. The statute of this state defining acts which are made penal as having an improper effect upon merchandising expressly excepts organizations formed for the purpose of conducting operations for marketing at a reasonable profit or the marketing of products 'which cannot otherwise be so marketed.' Stats. of 1909, p. 593. It will not be inferred, without proof of the fact, that an organization, the purposes of which appear to be legal and legitimate on their face, is actuated by a hidden design to operate in a way that is prohibited by law."

In the *Poultry Producers* case, supra, the Supreme Court of California said:

> "We see no reason for holding that the contract creates an unlawful trust or combination in restraint of trade in contravention of the Cartwright Act. Appellant contends that the contract violates subdivisions 3 and 5 of section 1 of that act. It may be assumed, for the purpose of this decision only, that the contract would be contrary to subdivisions 3 and 5 of section 1, but for the proviso that was added in

1909 reading: 'Provided that no agreement, combination or association shall be deemed to be unlawful or within the provisions of this act, the object and business of which are to conduct its operations at a reasonable profit or to market at a reasonable profit those products which cannot otherwise be so deemed to be unlawful, or within the provisions of this act, for persons * * * engaged in the business of selling * * * commodities of a similar or like character, to employ, from (or) organize * * * any * * * corporation, having for its object or purpose the * * * marketing * * * of such commodities. We think it fairly inferable from the findings that the object of the agreement executed by defendant and the other poultry raisers, as a result of which plaintiff was incorporated and organized, and the object and business of the combination or association thus formed were to market the poultry raisers' eggs at a reasonable profit; also that only by the formation of some such co-operative association, and the organization of a common sales agency, such as plaintiff, can their eggs be marketed at a reasonable profit. Moreover, it further appears from the trial court's findings that defendant and the other poultry raisers who signed similar agreements are persons engaged in the business of selling commodities of like character, to wit, eggs; that they organized plaintiff as a corporation entity and employed it as their common sales agency; and that plaintiff's object and purpose is the marketing of such eggs. Thus is the clause of the proviso of 1909, whereby certain agreements, combinations, and associations are recognized as lawful and are expressly declared not to be within the inhibitory provisions of the Cartwright Act."

COLORADO

The recent decision in *Rifle Potato Growers* v. *Smith* (Col. 240 Pac. 937 removes the question as to the of that state which arose from the prior decision in *ns* v. *Wray Co.* 65 Colo. 425; 176 Pac. 487 and *At-*

kinson v. *Colorado Wheat Growers Association* 238 Pac. 1117.

In Rifle Potato Growers v. *Smith*, the Supreme Court held that the Co-operative Marketing Act of Colorado and associations formed thereunder did not violate the Sherman Anti-Trust Law. This holding is contained in the following language:

> "It is urged that the act in question and the contract under it are in violation of the so-called Sherman Anti-Trust Law (26 U. S. Stat. 209 (U. S. Comp. St. §§8820-8823, 8827-8830).) That act was finally construed in Standard Oil Co. v. U. S., 221 U. S. 1, 31 S. Ct. 502, 55 L. ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912D, 734, as prohibiting only contracts which amount to an unreasonable or undue restraint of trade in interstate commerce. See, also, Phez v. Salem Fruit Union, supra. If what we have previously said is right, this act and contract cannot be classed as in undue or unreasonable restraint of trade, and it has uniformly been so held in the various states where these contracts have been considered. *Wash. Cran. Ass'n* v. *Moore*, *supra*; *Phez* v. *Salem Fruit Union*, *supra*; *Tobacco Growers' Co-op. Ass'n* v. *Jones*, 185 N. C. 265, 117 S. E. 174, 33 A. L. R. 231; *Brown* v. *Staple Cotton Growers' Ass'n*, 132 Miss. 859, 96 So. 849, and other cases in North Carolina, Indiana, Kansas, Alabama, and United States courts."

GEORGIA

In *Harrell* v. *Cane Growers Co-op. Ass'n* (1925) Geo. 126 S. E. 531, the Supreme Court of Georgia held:

> "It plainly appears from the terms of the Co-operative Marketing Act of 1921, as well as from the mode of business to be carried on by the association authorized to be created by said act, and from the contract in evidence, that the Cane Growers' Co-operative Association is not intended to create a monopoly, within the meaning of that word as used in article 4, 12, par. 4, of the Constitution. So far as

appears from the present record, it will be impossible for it to create a monopoly (within the ordinary significance of that term) in the agricultural product with which it deals. Nor is the contract between the Cane Growers' Co-operative Association and its members invalid as in restraint of trade."

In the course of a lengthy opinion in which the court reviewed the authorities, the conclusion was reached that co-operative marketing does not defeat or lessen competition, but fosters agriculture by providing a stable market. The Chief Justice said:

"It is plain from the caption of the act that the effect of the corporation is not intended to be 'defeated or lessen' competition between dealers or sellers of agricultural products, and that it will not have that effect, but that the intent and purpose of the act is to foster agriculture by providing a stable market, preventing speculative fluctuations, and enabling the agricultural producer to sell his crops by degrees, instead of being forced by his necessities to throw the product of his labor in bulk upon a depressed (because overstocked) market, creating thereby a condition which will not lessen the price to the consumer, but only enable the speculator or middleman to reap a profit which justly belongs to the producer."

After showing that no monopoly is possible, although the agreement was dependent upon the Association controlling 25 per cent of the area cultivated in Cane, the Chief Justice added:

"Is the contract in question in restraint or trade? We think not."

The court then tests the contract by showing that it is reasonable between the parties and not injurious to the public. Upon the latter point the court said:

"This state is largely agricultural. Agriculture forms the biggest element of its earnings and increased wealth. It must contribute more largely than anything else to the future prosperity of our state. Agricultural prosperity in the future may be

largely dependent upon diversification, and a state policy of attracting part of our agricultural population to the production of cane rather than cotton might afford a necessary stimulus to the production of cane. Various considerations well understood by those versed in agriculture, of which the Legislature had the right to take notice, may have induced it to hold that this partial restraint of trade would be really beneficial to the public interest. For this reason it does not appear to me 'that the restraint contracted for' is 'specially injurious to the public interest,' and the contract must be held to be 'supported by a sufficient consideration,' and that the restraint is reasonable.

* * * * *

"The purpose of the associations would be entirely defeated by any other method of conducting their business than that which is dependent upon the contract. Unless the association can control within its territory a sufficient amount of the cane produced to effect the price and produce better prices and effect savings in distribution by holding its syrup until such times as may be most advantageous to sell, it can neither stabilize the market nor produce a higher price. Experience has shown that farmers are compelled by their necessities to sell their products as soon as produced, in order to pay debts which are due. The provision which allows the association to remove this cause of depression by advancing its members sums to discharge liens and other pressing obligations, so that the product can be held, and by the credit of the association providing its members with a credit which they perhaps do not possess, would seem would produce a new era in the fostering of agriculture. Such a new era was badly needed in the opinion of the General Assembly, and for myself I concur in the view of the General Assembly."

Illinois

In *Milk Producers Marketing Co., Appellee*, v. *Arthur M. Bell, Appellant* (1924) 234 Ill. App. 222, the court sustained the validity of a co-operative marketing as

sociation organized under the general corporation laws as a corporation not for profit, but referred to the recent Standard Co-operative Marketing Act of Illinois, as follows:

"We do not deem it necessary to consider each of these points in detail for the reason that in many of the cases which are cited in this opinion all of these questions are determined. For a great many years Illinois has encouraged, by statute, co-operative marketing. The last legislature passed a most complete and comprehensive statute upon that subject. In fact, most of the questions raised upon this appeal are provided for in that statute by express terms, including injunctions, liquidated damages and solicitor's fees. Other States, including Kansas, Washington, Oregon, California, Texas, Mississippi, North Carolina and Kentucky, have passed similar statutes. Most of the questions raised upon this appeal have never been before the Supreme Court of Illinois but they have been before the courts of these other States and the decisions are substantially uniform. Most of these decisions are quite lengthy and it will be impossible within the reasonable limits of an opinion to quote from them at any considerable extent, therefore we will merely state what these cases have held. It is sufficient to say, however, that the decisions rendered by the courts of the various States have considered in great detail all of these questions and it is only necessary to read those decisions to become fully convinced that there is no merit in any of the contentions made by appellants. In most of the cases where these questions have been considered the corporation has been organized under a co-operative statute, and while it was not a corporation for pecuniary profit, it was engaged in substantially the same character of business appellee was engaged in, the business was carried on in substantially the same manner, and in each of these cases it was held that the corporation was not engaged in a business which produced pecuniary profit for its members. * * * (citing cases.)

From our examination of the authorities cited and from the statute of our own State, we hold that

because of the fact that appellee distributed all of the proceeds of sale among its members, after the deduction of expenses, that appellee was not a corporation doing business for pecuniary profit, and was legally organized under the statute providing for corporations not for pecuniary profit."

INDIANA

We have previously referred to the two recent decisions in the state which directly concern the Bingham Act, and the Burley and Dark Tobacco Growers Co-operative Association, namely *Burley Tobacco Growers Co-operative Association* v. *Rogers* (1926) Ind. App. 150 N. E. 384 and *Robertson* v. *Dark Tobacco Growers Co-op. Ass'n* (1926) Ind. App. 150 N. E. 106.

The law declared in these cases was established in the much cited opinion in *Burley Tobacco Society* v. *Gillaspy* (1912) 51 Ind. App. 583; 100 N.E. 89. In that case, the court said:

"The complaint in the instant case shows that appellant is a corporation organized pursuant to the laws of the state of Kentucky, not for profit, but for the purpose of fostering and promoting the interests of all growers of Burley tobacco, to encourage the betterment of its quality, to act as agent for the growers of Burley tobacco in the marketing of their crops, and to aid and assist all such growers in obtaining a fair and remunerative price therefor; and that such price should not be lower than that fixed by appellant on like grades of tobacco."

The court then discussed the provisions of the then existing Kentucky statutes permitting the pooling of farm products. (*Carroll's Kentucky Statutes* 1903 §3941a) and the relation of such statute to Section 198 of the *Kentucky Constitution* and the Laws of Kentucky against monopolies and trusts.

The court quoted with approval from *Owen County*

Burley Tobacco Society v. *Brumback*, 128 Ky. 152, 107 S. W. 715 and *Commonwealth* v. *Hodges*, 137 Ky. 233, 125 S. W. 689, as to the necessity for the formation of a tobacco pool and as to the existence of a trust among tobacco buyers so that "single handed, the producers were unable to compete or deal in terms of equality with these trusts and combinations that controlled the markets in which the farmer was obliged to dispose of his produce. To meet the condition of affairs thus presented, and to enable the farmers to combine their resources and place their products in the hands of an agent selected by them, to the end that better prices might be obtained, this act was passed."

With reference to the character of the pool formed by the Burley Tobacco Growers under the 1909 statute, the court said:

> "In this case, we think it may be admitted that the contract in suit was executed in furtherance of a combination in restraint of trade by the growers of Burley tobacco, the market for which was controlled by a trust. But the purpose of the combination does not appear to be other than to secure a fair and adequate price for their product. We think such acts could not be held to be in conflict with the morals of the time or to contravene any established interest of society. Public policy does not ask those who till the soil to take less than a fair return for their labor. Public policy safeguards society from oppression; it is not an instrument of oppression."

The Indiana court therefore sustained the contracts entered into by the Burley Tobacco Growers under the then existing Kentucky Statute and overruled the claim that such contracts were contrary to the Anti-Trust Laws of Kentucky and Indiana.

Iowa.

In *Clear Lake Co-operative Live Stock Shippers' A*
sociation v. *Weir*, decided December 15, 1925, Iowa 2
N. W. 207, a co-operative association organized und
the Standard Co-operative Marketing Act brought s
for liquidated damages against the member.

The member defended on the ground that the law v
lated the Anti-trust law but the court decided that it d
not. The court also held that under the present Co-op
ative Marketing Act of Iowa the prior decisions
Reeves v. *Decorah Farmers' Co-op. Society*, 160 Io
194; 140 N. W. 844, and *Ludowese* v. *Farmers' Co*
Co., 164 Iowa 197; 145 N. W. 475, were no longer the l

Concerning the claim that the co-operative asso
tions organized like the defendant in error violated
Anti-trust laws, the court said in part:

> "The demurrer also challenges the validity of
> tion 11 of the act in question upon the ground t
> it violates section 5067-a, Code Supplement 1
> (section 9915, Code 1924). This section prohi
> combinations, pools and trusts, price fixing, and
> terference with any form of competition in the b
> ing or selling of any commodity or article of c
> merce. The thought of counsel is that section
> promotes monopolistic agreements, price fixing,
> elimination of competition, and for these reason
> contrary to section 9915 as well as to public pol
> The contention of counsel may be answered in
> ways. In the first place, chapter 1922 was enac
> subsequent to section 9915, *supra*. • • •
>
> Chapter 122 is as much a declaration of pu
> policy as section 9915. One has no greater sanc
> in this regard than the other. *Dickey* v. *Jack*
> 181 Iowa 1155, 165 N. W. 387.
>
> It is a well-established rule of statutory const
> tion that the last enactment of the Legislature u
> a given subject must prevail, and a former en
> ment to which it is repugnant will be deemed to h

been repealed by implication. *State* v. *Brandt*, 41 Iowa 593; *State* v. *Shaw*, 28 Iowa 67; *State* v. *Courtney*, 73 Iowa 619, 35 N. W. 685 *Casey* v. *Harned*, 5 Iowa 1; *Serrin* v. *Grefe*, 67 Iowa 196, 25 N. W. 227; *McKinney* v. *Wood*, 35 Iowa 167. The right of the Legislature to enact legislation for the incorporation of non-profit sharing, co-operative associations is not questioned. Perhaps the Legislature, taking cognizance of altered conditions in farming and other industries, believed a change of public policy should be adopted.

In the next place, a mere selling agency is not *per se*, a monopoly. • • •

It is sufficient for present purposes to say that the contract in question and the by-laws of the association are in strict harmony with the specific provisions of chapter 122. This being true, effect must be given to the act according to its terms.

If the decisions of this court in *Reeves* v. *Decorah Farmers' Co-op. Society*, *supra*, and *Ludowese* v. *Farmers' Co-op. Co.*, 164 Iowa 197, 145 N. W. 475, are in any way in apparent conflict with the conclusion herein reached, it must be remembered that they were both decided prior to the enactment of chapter 122, Laws of the Thirty-Ninth General Assembly, and involved almost wholly dissimilar facts."

Kansas.

In *Kansas Wheat Growers' Association* v. *Schulte*, (1923), 113 Kan. 672, 216 Pac. 311, an association organized under the Standard Co-operative Marketing Act and similar in its structure and organization to the defendant in error brought suit for an injunction to restrain a member from violating his contract. The point was made that the Statute and the Association violated the anti-trust laws. The court held against this claim, and said:

> "Under similar statutes, where questions have been raised, it has been generally held that an organizaion of this character is not an unreasonable com-

bination in restraint of trade, neither does it creat
an unlawful monopoly in the sale of such products.'

In a most recent Kansas case, the direct question wa
raised that the Standard Co-operative Marketing Act o
Kansas violated the Federal Anti-Trust Law. *Kansa
Wheat Growers' Association* v. *Charlet* (1925), 118 Kan
765, 236 Pac. 657. The court held against this claim i
the following brief paragraph:

> "Defendant contends the Co-operative Marketin
> Act Contravenes the Constitution of the Unite
> States because it permits a monopoly which woul
> otherwise be condemned by the Anti-Trust statute
> and so creates an exception to the Anti-Trust stat
> ute, for the benefit of a favored class. The case o
> *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 2
> S. Ct. 431, 46 L. ed. 679, is cited. One flaw in th
> contention consists in the fact that the Co-operativ
> Marketing Act does not create monopoly of the kin
> denounced by the Anti-Trust Act. *Wheat Growers
> Association* v. *Schulte*, 113 Kan. 672, 216 P. 311."

Kentucky.

We have previously referred to the Kentucky case
which, beginning with 1908, clearly set forth the histor
and necessity for co-operative associations of Burle
Tobacco Growers and establish that for nearly twent
years it has been the public policy of Kentucky to uphol
such associations.

For this reason we cite the Kentucky cases withou
further quotation or comment:

> *Owen County Burley Tobacco Society, et al.* v
> *Brumback* (1908), 128 Ky. 137, 107 S. W. 71
> *Commonwealth* v. *Hodges* (1910), 137 Ky. 23
> 125 S. W. 689.
> *Louisville & N. R. Co.* v. *Burley Tobacco So
> ciety, et al.* (1912), 147 Ky. 22, 143 S. W. 104

Potter v. *Dark Tobacco Growers' Co-op. Ass'n* (1923), 201 Ky. 441, 257 S. W. 33.

Liberty Warehouse Co. v. *Burley Tobacco Growers' Co-op. Ass'n* (1925), 208 Ky. 643, S. W. 695.

Jewell Tobacco Warehouse v. *Kemper* (Decided Jan. 20, 1925), 206 Ky. 667, 268 S. W. 324.

LOUISIANA.

In *Louisiana Farm Bureau Cotton Growers' Co-operative Association* v. *Clark* (Decided Jan. 4, 1926), 160 La. ., 107 So. 115, a co-operative association organized under the Standard Co-operative Marketing Act of Louisiana brought suit to compel specific performance of the standard form of co-operative marketing contract. The court upheld the Co-operative Marketing Act, the association formed thereunder and the contract, as against the claim that the Anti-Trust Laws were violated. In so holding, the court said:

"The act, apparently, does not contemplate any monopoly to corner the market, but merely permits associations organized under it to handle cotton produced or controlled by its own members, solely upon a co-operative marketing plan or basis.

Upon its face, Act 57 of 1922 does not authorize the making of a contract or the forming of a conspiracy or combination in restraint of trade.

It is therefore incumbent upon defendant to prove that a monopoly has been created, or that trade has been restrained by plaintiff, Association, in order to annul the agreement signed by him. This defendant has failed to do.

It is evident, therefore, that neither the act, nor the contract made under it by defendant, can be annulled in this case as violative of section 14 of article 19 of the Constitution of 1921." (Citing cases.)

Minnesota.

In *Minnesota Wheat Growers' Co-op. Ass'n* v. *Huggins* (1925), 162 Minn. 471, 203 N. W. 420, the court said:

> "This act involves the Co-operative Marketing Law (Sec. 6079, 6113, U. S. 1923) and the right of the Association to enforce a membership contract made in harmony with the statute."

Against the law and the contract, it was claimed that it created a monopoly and combination in restraint of trade; contravened the Fourteenth Amendment to the Constitution of the United States; constituted a burden on Interstate Commerce and inflicted penalties contrary to public policy. The court discusses the claim with respect to a violation of the Anti-Trust Laws at length; and says in part:

> "As indicated above, the Legislature has surrounded this law with every safeguard against it possibly resulting in a monopoly, and if its declared lawful purposes should, by unscrupulous officials, be diverted into those illegal transactions, which would subject it to the assault now made upon it, its immediate death would be certain. The law is purely one of expediency, and to better the economic condition of the producers. This statute makes the association possible. The association frees the market, makes it more open, less one-sided, less subject to manipulation and monopoly control on the part of those who deal in the commodities. It aids and harmonizes with this constitutional provision, which is aimed at those who hoard and speculate in food products, and who interfere arbitrarily and artificially with the natural flow of commerce in such products. It offers a plan as a basis for hope that the market may be stabilized and protected from fluctuation incident to an entire year's crop being dumped upon the market within a period of 60 days, and thereby demoralizing the market in the consequent fluctuation in price, which, in practice, is detri

mental to the producer and of little benefit to the public. There is nothing in the organic law of the association that indicates that its purposes are in any way antagonistic to the Constitution or to Section 10463, G. S. 1923, enacted pursuant thereto, or to the spirit and intent of the Co-operative Marketing Act. In fact, all the wheat owned by the members is sold upon the markets in open competition with dealers. The wheat is delivered to local elevators. The same agencies and instrumentalities are used to put the wheat on the market. It reaches the same terminals, and is sold to the same millers. The association is merely a selling agency. As such agency it carries on the marketing for its members, who pool the price in grain from time to time. The agency can do little more than a businesslike farmer, who is financially able to choose his market. By reason of having credit, it may do more than a farmer whose finances will not permit him to wait for a satisfactory market. It may, perhaps, by selling in large quantities, sell to better advantage, but no better than any other dealer or sales agency with similar capital. The association makes no effort to do anything that the individual member might not legally do for himself. We see nothing in the organization, if carried out in the spirit and intent in which the law was passed, to infringe upon the constitutional provisions. The Legislature has surrounded the organization scheme with every protection, so that, if any attempt is made to violate the spirit and intent of the statute, the parties are subjected to the restrictions of the law.

We do not say that this organization like any other corporation, association, or individual may not violate the law. It may. If so, it may be punished the same as all other persons or corporations who transgress. These persons come both in the name and intent of an open, free, and unrestricted market. They seek the privileges of such in equal competition with dealers. They ask for nothing more. The articles of association, by-laws, and the statute under which it is organized proclaim its legality. Every provision of the contract which is pointed to as an element of the alleged act constituting a restrain of

trade is authorized by the statute. The statute does not authorize anything forbidden by the Constitution. The element that puts a monopoly under the ban of the law is that it tends to prevent competition and enhances the price of the commodity involved, or deteriorates quality or service and impoverishes the competitor, and these characteristics are absent in plaintiff's scheme of organization. The divergent opinion in this difficult field of legislative action should admonish us that we must not close the door to experiment within a law so surrounded by governmental watchfulness and control. Under similar statutes, where questions have been raised, it has been generally held that an organization of this character is not an unreasonable combination in restraint of trade, nor a monopoly in the sale of such products. (Citing cases.)

The object of such a co-operative marketing agency is to serve the financially weaker and more scattered members of society, and this is on the theory that by giving such aid to such persons it inures to the public welfare. Obviously there is a great difference with reference to the effect upon society between a combination of a few or many financially powerful men or corporations, who are able to get together and dominate and control a particular industry and the prices of its products, and a combination of farmers, each weak in his individual strength and financial power, numbering into thousands and located here and there over a large territory. The most that can be expected from co-operative marketing organizations is an improvement in the condition of the agricultural classes. There is nothing in this arrangement relative to the price at which wheat shall be sold by the association. It has power and discretion to sell to best advantage. But it is not given all the power at the end of the bargain. A steady market and a reasonable price are the prominent features of the plan. The association is also ambitious to have a continuous market for the producer for 12 months in the year, instead of two or three. It is difficult to understand how a steady market and a reasonable and profitable price to the producer would be inimical to the public

welfare of the state. Such would be beneficial, not only to the producer, but to every person engaged in any business in the state. It is certain that those who might wish to monopolize the market would never adopt this law for their instrumentality. Financial discouragement from what is believed to be unfair dealing, like idleness, tends toward degeneracy. We see no opportunity in the lawful performance of the corporate duties of the association to interfere with or restrict the freedom of the markets, unless it may be said that this results from holding wheat to sell on a satisfactory market. Each farmer has this privilege. We see no reason why, under the restrictions imposed by the law, this Association, as a selling agency, should not have the same privilege in this respect. If, technically, there is any such interference or restriction in this conduct, it is insignificant, and no such interference or restriction resulting from a law of this character should have judicial recognition, unless the result thereof is detrimental to the public interests. Interested parties are entitled to fair protection. *Wash. Cran. G. Ass'n* v. *Moore*, 117 Wash. 430, 201 P. 773, 204 P. 811, 25 A. L. R. 1077; *Tobacco G. Co-op. Ass'n* v. *Jones*, 185 N. C. 265, 117 S. E. 174, 33 A. L. R. 231; *Ga. F. Ex.* v. *Turnipseed*, 9 Ala. App. 123, 62 So. 542. The record fails to show such, and, it being equally silent as to any effort toward fixing prices, limiting production, controlling the market, or impoverishing competitors, there is no monopoly."

Mississippi.

In *Brown* v. *Staple Cotton Co-op. Ass'n* (1923), 132 Miss. 859; 96 So. 849, a cotton co-operative association organized under an Act and along lines similar to those involved in the case at bar, brought suit for specific performance of the co-operative marketing contract. The Supreme Court of Mississippi upheld the Co-operative Marketing Act and contract. Upon the point that the Anti-Trust Law was violated, the court said that its inter-

pretation of the law was in harmony with that of the Supreme Court of the United States; and concerning co-operative associations, the court said in part:

> "The plan of appellee association considered in connection with the marketing and association contracts between appellee and it members does not undertake to fix prices of long staple cotton. The outstanding purpose is to promote intelligent warehousing and marketing of such cotton. Appellee association goes out in the open market and hunts purchasers who compete against each other. It is simply a sales agency or a plan for group marketing. It is true it has large powers, but not even all the power at one end of the bargain. One of the main purposes is not to prevent long staple cotton growers from being forced on account of their financial necessities to dump their cotton on the market during the three or four months of harvesting time. A steady market and a reasonable price are central ideas in the plan, a continuous market for the producer the year round, instead of for only three or four months. Another object is to save expense to the producer by means of having large quantities of long staple cotton stored, classed, and marketed by appellee association instead of by thousands of producers, who know nothing about classing cotton. Appellee association under the arrangement is able to sell direct to the mills as well as to others. Mississippi is almost exclusively an agricultural state. Its chief product for market has always been, and probably always will be, cotton. It would be hard to conceive of how a steady market and a reasonable and profitable price for cotton to the producers would be inimical to the public welfare in this state. On the contrary, it would appear that not only every cotton producer in the state would be benefited thereby, but also every other person engaged in any kind of business whatsoever.
>
> Although the Co-operative Marketing Act (chapter 179, Laws of 1922) does not and could not declare what the public policy of the state was before its adoption, still it ought to be persuasive on the courts as to what was inimical to the public welfare at that time. It embodies the judgment of the

Legislature recently after the making of the contracts involved. By it all such contracts for the future are declared legal; they are authorized in order to promote what the Legislaure thought was the public welfare."

NEBRASKA.

In *Nebraska Wheat Growers' Ass'n* v. *Norquest* (Decided July 1, 1925) Neb. 204 N. W. 798, the Nebraska Wheat Growers Association brought suit to restrain a member from violating the standard form of co-operative marketing contract.

The point was made that the Co-operative Marketing Act and contract violated the Anti-Trust Laws of Nebraska and of the United States; but the court said:

"We are not unmindful of the evil sought to be avoided at common law by Congress in enacting anti-trust laws, and by our Legislature in enacting the above statutes, to wit, combinations in restraint of trade in the hands of individuals. However, as we view the contract in question, its purpose is not to retard, but to stimulate, trade, by intelligent and efficient management by the few in close touch with the demand for wheat, considered in connection with the mode and distance of its transportation, and its impelling enticement to buyers by reason of the quantity controlled by those in charge. It is organized for mutual help, is without capital stock, is not conducted for profit, but is a simple, businesslike scheme of those engaged in wheat growing to advantageously handle and market their product, and this without encroachment upon the rights of others. That it is without the evil aimed at by anti-trust laws is proved by its being open to all, its profits, if any, divided without preference, and there being nothing within its scope or procedure which tends to control prices, restrain trade, or prevent competition. Thus, we conclude that this contract does not contravene either of the above mentioned statutes or the common law. In this conclusion we are sustained by the following cases deciding similar questions both as to law and fact:" (citing cases.)

New Hampshire.

In *Manchester Dairy System, Inc.* v. *Hayward*, decided January 5, 1926, ____ N. H. ____, 132 Atl. 12 (Advance Sheet March 11, 1926), a co-operative association brought suit for the specific performance of a contract for the co-operative marketing of dairy products. The court held that the contract was not opposed to public policy and said:

> "Associations of the character here exist in practically all of our states and deal in nearly every form of agricultural product. From year to year the co-operative idea in marketing has been assuming wider scope and greater economic importance. Public approval of such co-operative organizations is evidenced by the adoption of enabling legislation in more than two-thirds of the states, including our own (Laws 1925, c. 33), as well as by the Congress (U. S. Comp. St. Ann. Suppl. 1923 §§ 8716j, 8716j(a). See Columbia Law Review, February, 1923, p. 91. *Co-op. Ass'n.* v. *Jones*, 185 N. C. 265, 270, 117 S. E. 174, 33 A. L. R. 231. Such legislation has received liberal construction by the courts. *Minn. Wheat Growers' Association* v. *Huggins* (Miss. 1925) 203 N. W. 420 *et seq.* No sufficient ground appears from the record for holding that the contract here under consideration is contrary to public policy."

New York.

In *Bullville Milk Producers' Association, Inc.* v. *Anderson* (1919, 108 Misc. Rep. 582, 178 N. Y. S. 612, a co-operative association brought suit to recover liquidated damages for breach of a co-operative contract. The defendant urged that the contract was in restraint of trade, but the court said at page 613:

> "In regard to the other point raised by plaintiff, it seems to me that the agreement in question constitutes a valid and binding contract, and is not void as being against public policy or in restraint of

trade. The incorporators of this association desired to engage in the business of shipping milk, and it was quite necessary that they be assured of the continued patronage of their members in order to justify the association in going to the expense of acquiring or erecting a creamery. It cannot be said that an agreement such as this would tend to restrain trade or stifle competition; on the contrary, it seems to me that it encourages competition; on the contrary, it seems to me that it encourages competition by bringing a new creamery into being.

There are no cases cited in the defendant's brief which sustain his contention that a contract such as this one is void as being against public policy and in restraint of trade. On the other hand, my attention has been called to an unreported decision in Supreme Court, Lewis county, made by Mr. Justice Emerson in an action brought by *Castorland Milk & Cheese Co.* v. *Schantz*, 178 N. Y. Supp. _____, in which the facts are almost identical with the case at bar, and in which Judge Emerson upheld the contract."

A like decision was reached in *Castorland Milk & Cheese Co.* v. *Schantz*, (1919) 179 N. Y. S. 131.

North Carolina.

The decision of the Supreme Court of North Carolina in *Tobacco Growers' Co-operative Association* v. *Jones*, and four other cases, (1923) 185 N. C. 265, 117 S. E. 174, has been much quoted and cited. The cases involved suits by a Tobacco Growers' Co-operative Association and by a Peanut Growers' Co-operative Association to enforce the standard form of co-operative marketing contract. The associations were organized under co-operative marketing acts and were in all essential respects similar to the Association in the present case. The opinion of the court was written by Chief Justice Clark. It is an able study of the entire question of co-operative marketing.

The court upholds the Co-operative Marketing Act the form of contract and the associations involved against the claim that the same violated the Anti Trus Laws.

The Chief Justice said, in part:

"Section 26 of the statute provides, as above stated:

'No association organized hereunder shall b deemed to be a combination in restraint of trade o an illegal monopoly; or an attempt to lessen compe tition or fix prices arbitrarily, nor shall the market ing contracts or agreements between the associa tion and its members, or any agreements authorize in this act be considered illegal or in restraint o trade.'

The constitutionality and validity of this stat ute are determinative of this controversy and in ef fect cover the entire subject of this litigation. Agri culture is the greatest business in this country, and as said in *Bickett* v. *Tax Commission*, 177 N. C. 43 99 S. E. 419, 'by the census, 81 per cent of the peo ple in this state are engaged in farming.' In tha case, chapter 168, Laws 1919, entitled 'An act to pro vide improved marketing facilities for cotton,' wa held constitutional and valid, and that decision i practically conclusive of this case. The object i view of that statute, as in this, as to protect th farmers against combinations by which they wer forced to accept in the sale of their produce price fixed by combinations of buyers or manufacturers and it was intended to give them an opportunity b agreement among themselves to dispose of thei products under regulations which would protec them. There was no intention, and it is clear ther is nothing in this statute, to enable the producers t combine to sell their products at a profit beyon what would be a fair and reasonable market price Indeed, this would be impossible on the part of th producers as only a part of them would in any even belong to such an organization; whereas, the manu facture of tobacco, being in comparatively a fe hands, the buyers could combine, as they have don for many years, in a so-called 'gentlemen's agree

ment' to fix the price which would be paid for the raw product and agree in the same way upon a price for the manufactured product, with the well-known result that the producers of tobacco, the farmers, have received the bare cost of production in this artificial market, and not always that, while the combination of tobacco manufacturers have accumulated vast fortunes.

In view of the necessity of protecting those engaged in raising tobacco against the combination of those who buy the raw product at their own figures and sell it to the public at prices also fixed by themselves, this movement has been organized. By a careful examination of all the provisions of the act under which the association is acting, it will be seen that ever precaution has been taken to insure that it will not be used for private gain and can operate only for the protection of the producers."

The court answers the claim that a monopoly is authorized as follows:

"An examination of this statute shows, we think, that this association is authorized for the purpose, not of creating a monopoly, but to protect the tobacco producers against oppression by a combination of those who buy, and not to authorize, and does not empower, those who produce the raw material to create a monopoly in themselves. Indeed, it seems to us plain that the plaintiff under the provisions of its charter is not and never can become a monopoly for many reasons: (1) As a corporation of North Carolina, the moment it should become dangerous to the public, if that were possible under the terms of its charter, the General Assembly can at any time repeal its charter (Const. art. 8, § 1); and the courts will intervene to prevent it becoming a monopoly. (2) The plaintiff has neither capital stock, nor surplus; nor credit, except as given it by the statute, and this latter may be withdrawn at any time. It is wholly dependent upon its ability to borrow in large sums, which is necessarily under the control of the Federal Reserve Banking system, and the moment it shall deny credit to the plaintiff its efficiency would be destroyed. It can borrow from the Fed-

eral Reserve system, which is a function of the g
ernment, only on such terms as that board dee
consistent with the public welfare, and that bo
will not permit hoarding or monopolizing by
plaintiff.

The power of the Federal Reserve system w
shown in October, 1919, when by mere announ
ment of its policy it caused the deflation of the st
market. In May, 1920, when the operations of
War Finance Corporation were suspended by dir
tion of the Secretary of the Treasury so that
could not extend credit for the export of cotton,
cause cotton was scarce and a cotton famine w
threatened, there resulted a drop in cotton of
cents a pound in six months. Therefore, were
plaintiff to attempt to monopolize the sale of tobac
not only it would fail to control its sale by the la
numbers of producers who are not members of
organization, but it would be faced with the power
the General Assembly to repeal its charter and
put it into the hands of a receiver, like the propo
in 1893 to abolish the Farmers' Alliance Busin
Agency, and it would be denied the privilege of b
rowing from the Federal Reserve Bank or any of
correspondents. It would be subject to the v
itorial powers of the Secretary of Agriculture un
the anti-trust laws, and finally it would be c
fronted with the huge increase in the acreage
voted to tobacco, and, by the holding off from
market the normal production of any one year,
result would be the selling of two crops within
single year."

OHIO.

We have previously referred to the decision of
Supreme Court of Ohio in *List* v. *Burley Tobacco Gro
ers' Co-operative Association* (1926), 114 O. S. 361; 1
N. E. 471. That decision has recently been followed
Earley v. *The Co-operative Pure Milk Association*,
cided June 8, 1926, 115 O. S. 52.

OREGON.

The Supreme Court of Oregon has repeatedly enforced co-operative marketing contracts similar to those involved in the case at bar. *Oregon Growers' Co-operative Association* v. *Lentz* (1923), 107 Ore. 561, 212 Pac. 811; *Oregon Growers' Co-operative Association* v. *Riddle*, decided January 5, 1926, Ore. 241 Pac. 1011, (Advance Sheet, February 1, 1926.)

SOUTH CAROLINA.

In *South Carolina Cotton Growers' Co-operative Association* v. *English*, decided May 31, 1926, S. C. , 133 S. E. 542, the Supreme Court affirmed the following decree, passing upon the precise point involved in the case at bar:

> "As to the defense that the contract is invalid and illegal as being in restraint of trade under the state and federal anti-trust laws, the court is of the opinion that the contract between plaintiff and defendant is not subject to attack under the anti-trust laws, state, federal, or at common law, for the reason that the contract does not attempt to unreasonably restrict trade or fix prices, but is intended to promote the legitimate interests of those engaged in agricultural pursuits. The plaintiff association appears to be strictly co-operative, and is composed of cotton growers only, and the organization purports to be for the purpose of 'promoting, fostering, and encouraging the business of marketing cotton co-operatively, for reduction of speculation, and stabilizing cotton markets,' on a nonprofit basis. The court can find no law or reason to prevent growers of cotton or any other commodity, from organizing their marketing to the end that the product may be obtained, in an orderly way, and a reasonable profit obtained for the producers. The plaintiff association was organized pursuant to statute law of South Carolina, § 3427, vol. 3 of the Code of 1922, which expressly exempts such associations from the opera-

tion of the state anti-trust laws, and, under the federal statutes relating to monopolies and combinations, agricultural organizations are expressly exempt. U. S. Comp. St. § 8835f. I hold, therefore, that the alleged defenses that the contract between the plaintiff and the defendant is contrary to public policy, that it is in contravention of the constitution of the state and of the United States, and that it is in contravention of the acts of Congress relating to trusts and monopolies and the statute of this state with respect to the same subject, cannot be sustained. Such contentions have been disposed of by the decisions of the United States Supreme Court, and also of the state courts, in which the same contentions have been made with respect to similar co-operative marketing acts and contracts made thereunder. (Citing cases.)"

TENNESSEE.

We discuss the decison of the Tennessee Court of Appeals in *Tennessee ex rel. Thompson* v. *The Burley Tobacco Growers' Co-operative Association*, (Writ of certiorari denied and decision of Court of Appeal affirmed by Supreme Court of Tennessee January 15, 1927), in which it is specifically held that the defendant in error is not conducted contrary to the Anti-Trust Laws.

The point that co-operative associations organized under the Co-operative Marketing Act of Tennessee violated the Sherman Anti-Trust Law was raised in two other cases.

In *Dark Tobacco Growers' Co-operative Association* v. *Mason* (1924), 150 Tenn. 228, 263 S. W. 60, it was claimed "that the complainant was a trust, created and acting in violation of the Anti-Trust Laws of the United States, to wit, the Sherman Act; and in violation of the Anti-Trust Law of Tennessee; and for that reason the contract sued on could not be enforced."

The case was tried upon its merits and evidence was introduced, showing that the Association controlled 66⅔ of all dark tobacco acreage in the territory in which it intended to operate. The court said that notwithstanding this fact, the Anti-Trust Laws were not violated. In the opinion the court said:

> "In *United States* v. *Keystone Watch Co.* (D. C.) 218 Fed. 502, are listed the acts which make a combination illegal:
>
> (1) Coercion or suppression of competitors.
> (2) Unfair or fraudulent rivalry.
> (3) Arbitrarily fixing and maintaining prices.
> (4) Limiting production or creating an artificial scarcity.
> (5) Impairment of quality.
> (6) Decreasing wages and price of materials.
>
> Complainants is not shown to have been guilty of any of these acts. The mere fact that complainant is large and powerful, and may in the future be guilty of some one or more of these acts, does not render it an unlawful combination or trust."

After discussing the reported cases, the court came to the following conclusion:

> "Our conclusion, therefore, is that the contract sued on is not violative of the Sherman Anti-Trust Law. Nor do we think it is violative of the Tennessee anti-trust law."

The court distinguished other cases which were cited as follows:

> "These cases are not in point here. In each of them the facts showed that the defendant was a combination operating under such a plan or arrangement as tended to impair competition and to enhance prices to the injury of the public, while in the cause under consideration the facts do not establish any such thing on the part of complainant. In fact, the proof shows that the price fixed and maintained by complainant for the tobacco handled by it was lower than the price paid by buyers for tobacco outside of the association."

This conclusion was adhered to in *Dark Tobacco Growers' Co-operative Association* v. *Dunn* (1924), 150 Tenn. 612, 266 S. W. 308, in which the first syllabus reads:

> "Bingham Co-operative Marketing Act, Ky., authorizing formation of co-operative marketing associations for distribution of agricultural products, held not violative of either state or federal Anti-Trust Statutes (U. S. Comp. St. § 8820 *et seq.*).

In another recent case, decided by the Court of Appeals of Tennessee, entitled *Tennessee Cotton Growers' Co-operative Association* v. *Hanson* (decided April, 1926, not yet officially reported), Judge Senter said:

> "A majority of the states have enacted Co-operative Marketing Acts authorizing the formation and incorporation of growers of farm commodities intended to improve marketing conditions, and to afford producers of various farm products better facilities to profitably and economically market the products of the soil. There is great similarity in these enactments. There is also great similarity in the general organization scheme and organization agreements and marketing agreements authorized by the Acts of the several states which have been statutory provision for such organizations and associations. The wisdom and fairness as well as the importance of this character of legislation has been generally approved and commended by the Courts. Enactments of this character by the various states have been uniformly upheld. The organization agreements and marketing agreements of numerous co-operative associations have been frequently before the courts and have been frequently contested by individual members, but in every single instance, so far as we have been able to ascertain from an examination of the reported cases, these organization agreements and marketing agreements have been sustained."

Texas

Texas was one of the first states to adopt the modern form of Co-operative Marketing Act.

In *Hollingsworth et al v. Texas Hay Association* (1923), 246 S. W. 1068, a hay association, organized under the new Co-operative Marketing Act of 1921, brought suit to enjoin a hay dealer from inducing or attempting to induce a member from "inducing or attempting to induce him (a member) to break his contract with him, advising, aiding and abetting him with that purpose and object in view."

It was shown that the membership of the Association comprised a very large majority of the producers of prairie-hay throughout South Texas, and the defendant claimed that the Anti-Trust Law was violated. However, the court held as follows:

> "The terms of the act likewise dispose of the (1) claim above mentioned that the contract in question is in contravention of our anti-trust laws. By Section 26 it is explicity provided:
>
> 'No association organized hereunder shall be deemed to be a combination in restraint of trade or an illegal monopoly; or an attempt to lessen competition or fix prices arbitrarly; nor shall the marketing contracts or agreements between the association and its members nor any agreements authorized in this act be considered illegal or in restraint of trade.'
>
> We know of no constitutional reason why the public policy of the state may not be so declared. A similar act with like purposes has been passed by the federal Congress. See Capper-Volstead Act passed by the Sixty-seventh Congress and approved by the President February 18, 1922 (42 Stat. 388)."

Co-operative Marketing Contracts have been repeatedly enforced in Texas.

Texas Farm Bureau Cotton Association v. *Stovall* (1923), 113 Tex. 273, 253 S. W. 1101.

Texas Farm Bureau Cotton Association v. *Kyle* (1926), 281 S. W. 629.

Virginia

The Co-operative Marketing Law and Contracts made by associations, organized thereunder, with their members have been repeatedly upheld in Virginia, although the precise point made here with reference to the anti-trust laws has not been specifically passed upon.

Elmore v. *Maryland & Virginia Milk Producers Associations* (decided March 13, 1926), Va. 132 S. E. 521.

Reeves Warehouse Corporation v. *Commonwealth* (1925), Va. 126 S. E. 87; Error Proceedings in the Supreme Court of the United States dismissed upon motion of plaintiff in error (No. 327, October Term 1925).

Danville Warehouse Co. v. *Tobacco Growers Co-operative Association*, 129 S. E. 739.

Tobacco Growers Co-operative Association v. *Danville Warehouse Co., Inc.* (decided March 18, 1926), Va. 132 S. E. 482.

In the last named case the court said:

"It will be observed that section 25 of the act does not make it a criminal offense for a corporation conducting a warehouse to solicit or permit a member of the association to breach his marketing contract, but simply makes it liable to the association in a civil suit in a penal sum of not less than $100 nor more than $500 for each offense. The

object of the act is to encourage the co-operative marketing of farm products in Virginia, and this is sufficiently expressed in its title. The best results in co-operative marketing could not be attained without the organization of co-operative marketing associations, or exchanges, and the enforcement of the contracts between the association and its members."

Washington

In *Washington Cranberry Growers' Association* v. *Moore* (1921), 117 Wash. 431, 201 Pac. 773, suit was brought to enjoin a threatened breach of a co-operative marketing contract. The defense was made upon the following three principal contentions:

> "First, that the contract is void at common law as against public policy; second, that it is contrary to article 12, section 22, of the Constitution of this state, which is a section covering the matter of monopolies and trusts; and, third, that the contract is void as being in contravention of the Sherman Anti-Trust Act passed by the federal Congress on July 2, 1890."

The court analyzes the purpose of entering into the contracts involved in that case as follows:

> "Before the corporation was organized certain growers at times put upon the market cranberries of an inferior grade, and this caused merchants to refuse to buy berries from Pacific county. In order to avoid this situation it was necessary to enter upon an advertising campaign to stimulate the use of berries and to cause berries of uniform grade to be placed upon the market, as would be done if a large quantity of berries was shipped to a particular point at one time. Under the selling agency the quantity of berries going to any one market was regulated, and in this way tended to maintain or 'hold up,' as the evidence shows, the price. It was also for the purpose of enabling all growers to receive for their berries a uniform price. There

is nothing in the contract or the operation under it that limits the production or controls the price in any particular locality. While the selling agency was located in Portland the berries handled through the cranberry exchange representing the three corporations came in direct competition with eastern berries, as well as with the berries of independent growers. The cranberry association controlled about 2 per cent of the berries produced in the United States, the independent growers 32 per cent, and the American Cranberry Exchange, which was an organization operating in New York and Chicago, 65 per cent. The berries sold through the selling agency in Portland created by the three corporations sold at the market price, and the berries were shipped by the corporations to such points as Martin, the selling agent, designated. The evidence is that the price of the berries in the various markets was fixed and controlled by the American Cranberry Exchange. If the Pacific berries could not be sold for the same price as the eastern berries, the selling agent, after conferring with the members of the exchange, would sell for a lesser price. The contract and the delivery of berries under it not resulting in limiting the production, controlling or fixing of the price in any particular market, cannot be said to be void as against public policy, or under the constitutional provision above referred to or under the anti-trust act. * * * So far as we are informed, no case holds that a contract is void which does not limit the production or control or fix the price in a particular market. As above pointed out the contract here under consideration, considered in connection with the evidence showing the operation under it, neither limits the production or fixes the price."

A more recent case is *Pierce County Dairymen's Association* v. *Templin* (1923), 124 Wash. 557, 315 Pac. 352. In that case a co-operative association of dairymen brought an action to restrain a breach of a co-operative marketing contract. The court overruled the

defense that the contract was unenforceable because it tended to create a monopoly in restraint of trade, and said:

"It is further contended on behalf of Templin that this contract should be held unenforceable as against him because of its tendency to create a monopoly in restraint of trade. Looking alone to the provisions found in the articles of incorporation of the association, its by-laws, and the stipulation of this contract, we do not think the contract has the tendency so claimed for it. This corporation having been formed as a co-operative association under statutory authority, for the doing of the very things contemplated in its organization and by the execution of this contract, we think it would require strong, convincing considerations to call for the holding that this contract is so monopolistic in its character as to call for the holding of it to be invalid for that reason. So far as we may concern ourselves with a question of fact as to whether or not it has had that tendency, we are quite clear that the evidence does not show that it has had such tendency. The trial judge made no specific finding on this question of fact, but evidently he was of this same opinion. We think the purposes of the association, as evidenced by its articles of incorporation, its by-laws, and the making of these contracts, and what the association has in fact done, look to the efficient economical bringing of the producer and consumer of milk close together, and the avoiding of intervening profits to the loss of the producer, rather than to the unlawful controlling of the price of milk to the consumer. We conclude that there is no impediment to the enforcement of this contract because of its tendency to create a monopoly in restraint of trade."

Wisconsin

One of the leading co-operative cases is *Northern Wisconsin Co-operative Tobacco Pool* v. *Bekkedal et al.* (1923), 182 Wis. 571, 197 N. W. 936. In that case an

injunction was granted against tobacco dealers restraining them from interfering with or inducing the members of a Tobacco Growers' Co-operative Association to sell their tobacco to such dealers contrary to their co-operative marketing contract. The claim that the Co-operative Association, composed of 6,500 members, and its contracts with such members, constituted an illegal restraint of trade was vigorously urged upon the original hearing and a rehearing. However, the court was unanimously of the opinion that such associations were not within the intent of the Anti-Trust Laws. In the original opinion the court said:

> "Changed economic conditions have made co-operative associations both beneficial and necessary, and the Legislature had a right to enact laws declaratory of public policy in accordance with changed conditions."

With reference to this legislation the court said:

> "This legislation, being enacted subsequent to the enactment of our general anti-trust statutes, must be considered as modifying the scope of the former, and the validity of plaintiff's contracts, or the effect of their operation so far as they constitute a restraint of trade, is not to be tested by the provisions of section 1747e, or court decisions condemning contracts under similar legislative provisions. This legislation providing for the organization of co-operative associations manifests a clear purpose on the part of the Legislature, not only to authorize, but to encourage, co-operative effort along the lines to which the legislation is made applicable, and to legalize practices which no doubt were of questionable validity prior to the enactment of such legislation.
>
> The reasons for promoting such legislation are generally understood. It sprang from a general, if not well-nigh universal, belief that the present system of marketing is expensive and wasteful, and results in an unconscionable spread between what

is paid the producer and that charged the consumer. It was for the purpose of encouraging efforts to bring about more direct marketing methods, thus benefiting both producer and consumer, and thereby promoting the general interest and the public welfare, that the legislation was enacted."

In the opinion rendered on a motion for rehearing the court pointed out the inherent difference between a combination of a few to exercise control over a particular industry or commodity and a combination of farmers, each weak in his individual strength, numbering into the millions scattered far and wide. The court said:

"The former combination is small, compact, powerful. The inevitable tendency, and too often the plain result, is oppression to society. Any combination of the latter is necessarily weak and impotent, so far as securing a unity of control and action sufficient to result in oppression is concerned. The most that is hoped for from co-operative organizations on the part of the latter is slight improvement in the condition of the agricultural classes, a stimulus to more intelligent effort, and encouragement to carry on in a line of endeavor that is essential to human existence. It is recognized that the welfare of our agrarian population promotes the welfare of the nation. To say that society cannot prohibit combinations which are detrimental, without at the same time striking down co-operative associations which are beneficial, is to deny the most fundamental basis of all classification."

Canada

The precise question before this court has recently been decided by the Canadian courts.

Saskatchewan Co-operative Wheat Producers, Ltd., v. *Zurowski* (1926), 3 D. L. R. 810 (Weekly Advance Reports of September 23, 1926).

The above decision sustains the validity of the Sa
katchewan Co-operative Wheat Producers' Associatio
which controls the selling of more than two-thirds
the wheat grown in the Province of Saskatchewan.

This decision is of great importance here because th
Canadian Association was organized under the sam
legal guidance and upon the same basis and uses sub
stantially the same contract as the Burley Tobacco Grow
ers' Co-operative Association.

The Canadian court passes directly upon the clai
that such association and such contracts are contrar
to the Canadian laws against restraint of trade an
holds they are not. This holding is in point here becaus
the Canadian Anti-Trust Law is similar to the Sherma
Anti-Trust Law; and is, if anything, more drastic i
its condemnation of combinations in restraint of trad

Furthermore, the Canadian courts have, to a larg
extent, followed the Supreme Court of the United State
in their interpretation of the Canadian Anti-Trust Law

Section 498 of the Criminal Code, Revised Laws
Canada (1916), provides that everyone is guilty of a
indictable offense and liable to fine or imprisonmen

> "who conspires, combines, agrees or arranges wi
> any other person * * *—
>
> (a) To unduly limit the facilities for transpor
> ing, producing, manufacturing, supplying, storin
> or dealing in any article or commodity which ma
> be subject to trade or commerce; or,
>
> (b) To restrain or injure trade or commerce i
> relation to any such article or commodity; or,
>
> (c) To unduly prevent, limit or lessen the manu
> facture or production of any article or commodity
> or to unreasonably enhance the price thereof; o
>
> (d) To unduly prevent or lessen competition i
> the production, manufacture, purchase, barter, sal
> transportation or supply of such commodity; or th
> price of insurance upon person or property."

Section 2 provides that nothing in the foregoing section shall apply to combinations of workmen for their reasonable protection.

In *Saskatchewan Co-operative Wheat Producers' Association, Ltd.*, v. *Zurowski* (1926), 3 D. L. R. 810, it appeared that more than 50,000 farmers had signed the standard form of co-operative marketing contract and agreed to dispose of their wheat only through the Co-operative Association for a period of five years. It was claimed that this was opposed to public policy and contrary to the Anti-Trust Law, because it restricted the farmer's right to sell his wheat where he choose, and because it tended to unduly stifle competition and enhance the price.

Each of the Judges discussed these claims.

Justice La Mont said at page 815:

> "The argument that the restriction tends to unduly stifle competition and enhance the price is not in my opinion entitled to serious consideration. The evidence establishes that in 1924 fully 80 per cent of the wheat handled by the Pool was sold direct to the millers and buyers in Europe, and that it is the European market which fixes the price, because the European countries are the buyers, and that, in selling in that market, the Pool has to compete with the sellers of every other wheat-exporting country. The evidence also discloses that the price is fixed in accordance with the economic law of supply and demand. These facts, in my opinion, totally refute the argument that the restrictions of the contract can in any way unduly lessen competition or enhance the price. How can the price in the European market be affected by the fact that the wheat-growers of Saskatchewan are sending their wheat to that market through the Pool rather than through a privately owned corporation? The wheat must get on the market through some agency or it will not be sold, for the individual farmer

cannot take it there himself. If, through the agency of the Pool, the farmers of this Province can market their grain with less expense than it would otherwise cost them, and divide among themselves the profits which a private individual or concern would make by placing their wheat on the market, so much the better for the farmers. That is their right, and it cannot be considered as unduly lessening competition or enhancing the price (*Weidman* v. *Shragge* (1912), 2 D. L. R. 734, 20 Can. C. C. 117).

Then, is the clause against public policy because it restricts the defendant to marketing his wheat through the agency of the Pool up to and including the year 1927? There is no doubt that it is in restraint of trade, because it prohibits the defendant from disposing of his wheat as he pleases. But contracts in restraint of trade are not invalid so long as the restriction is no more than adequate protection to the interests of the party in whose favor it is imposed, and is not injurious to the public interest."

The necessity for formal and binding contracts over a period of years and of safeguarding such contracts against breach in order to make co-operative marketing work is clearly pointed out in the following language:

"We have therefore to see in this case if the Pool has established that the restriction is necessary for the reasonable protection of its interests. The witnesses have pointed out that for the delivery in Europe of the immense quantity of grain covered by the Pool agreements, contracts must be made in advance for its transportation over the Great Lakes and across the Atlantic, and for elevator accommodation and so on. All these arrangements are made, and contracts entered into, and sales are made in anticipation of each contract subscriber living up to his contract and delivering the wheat produced by him, and estimate of which the Pool has. If a percentage of the farmers who have signed contracts do not live up to their agreement, the Pool and its agents might find themselves in the position of having made arrangements and entered into con-

tracts for the transportation and sale of large quantities of wheat without being able to furnish the grain for the cargoes or to complete the sales; in which case they would have incurred useless expenditure, and perhaps have rendered themselves liable to heavy damages; all of which would have to be borne by the other farmers comprising the Pool. The success of co-operative marketing must necessarily depend upon the selling agency being able to estimate with a fair degree of accuracy the grain for the transportation and sale of which it is its duty to make provision. If one farmer was not obliged by the contract to deliver to the Pool all the wheat he produces, save the exceptions provided in the contract, the other farmers would be in the same position, and the selling agency could never tell how much grain would be forthcoming, or what facilities it must provide. In my opinion it would be unable to carry out the scheme of co-operative marketing unless each contract-signer was under obligation to furnish the grain he had promised to deliver, and that for the full term of the contract. * * *

In the present case, considering the preparations that must be made for handling the immense quantity of grain covered by the contracts, the organization necessary for that purpose, the storage facilities to be acquired, and the perfecting of the selling organization in Europe, I am of opinion that the restriction prohibiting the defendant from selling to any other person than the Pool for five years was very reasonable, and necessary for the Pool's protection."

As to the public interest behind keeping co-operative marketing contracts inviolable, the court said at page 818:

"While it is in the public interest that every man should be allowed to sell his goods where he pleases, it is at least equally in the public interest that a man should not break his contracts. In *Underwood & Son* v. *Barker* (1899) 1 Ch., at p. 305, Lindley, M. R., said: 'If there is one thing more than another which

is essential to the trade and commerce of this country it is the inviolability of contracts deliberately entered into.' * * * I am therefore of opinion that the defence that the contract is in restraint of trade fails, and that the defendant is liable for breach of his contract."

Chief Justice Haultain and Justice McKay concurred with Justice La Mont in the foregoing opinion.

Justice Turgeon said after an analysis of the Canadian and English cases, at page 832:

"The purpose of the contract being to secure and encourage co-operative marketing in order that certain objects may be attained, how can a covenant by the defendant not to abandon the co-operation which he himself and his associates are seeking to establish, be said, under the circumstances, to be unduly restrictive? I think the covenant is in harmony with the main purpose of the contract, and therefore reasonable (*Ptg. & Numerical Registering Co.* v. *Sampson* (1875) L. R. 19 eq. 462).

I have already said enough, I think, to indicate what my view is on the second feature of the defendant's agreement, that is, his covenant to do all his marketing through the association. It is a contract of exclusive agency for a limited period. In my opinion this covenant is a necessary part of the whole plan of co-operation which the defendant and his associates had in mind when the agreement was signed. Without it they could hardly hope to attain their object, and the activities of the association would probably become too hazardous to be undertaken. Under the circumstances, I think it is a reasonable covenant. * * * The defendant therefore had a double object in mind in entering into the contract: to obtain better prices for himself, and also to improve the condition of the wheat-growing class by obtaining better prices for them all, and he relied upon the plaintiffs to accomplish this object for him and for his associates. The desired advantages were to be secured by the method of co-operative selling on the largest possible scale, with a pooling of prices, these methods to be pursued continu-

ously for 5 years, and to be carried on on such a scale as to eliminate or greatly lessen harmful speculation and to have a stabilizing effect upon world prices, the plaintiffs being obliged by the contract to invest part of their earnings in the construction and acquisition of grain-handling facilities, and to place the remainder in a reserve fund. Having regard, then, to the responsibility placed upon the plaintiffs, and the great advantages which they were expected to procure for the defendant, and for those in whom he took an interest, I think that the covenants be entered into on his part in order to enable them to accomplish their task, are reasonable, and not unduly restrictive. Anything else might well have been insufficient, and consequently unsafe. * * *

I have reached the conclusion that the contract in question is not inconsistent with the interests of the public, and that it survives this second test as well as the first. In dealing with a question of this kind in a Province of Canada, we must take into consideration, not only the rules of the common law as expounded in the English cases, but also the penal provisions of s. 498 of our Cr. Code. * * *''

Justice Martin said at page 860:

''The question before us is, whether, in the contract under consideration the parties agreed 'to unduly prevent or lessen competition in the * * * purchase, barter or sale' of wheat. In answering the question, one must of course bear in mind that the evidence shows that the contract in question is only one of a very large number, covering fully 50 per cent of the wheat produced in the entire Province. On its face the contract says that its object is to encourage the co-operative marketing of wheat, and 'for eliminating speculation in wheat and for stabilizing the wheat market.' There is nothing stated in the agreement as to the prices at which the commodity is to be sold; the plaintiff sells all the wheat handled by it, and the proceeds are divided among the growers; the contract cannot be said to be one 'to unreasonably enhance the price' of the commodity; indeed any agreement with respect to the wheat crop of the Province fixing a price, would

in all probability be useless, considering the natu
of the commodity involved, and the outside inf
ences which affect its price from time to time. T
desire expressed in the contract to eliminate sp
ulation, cannot be said to be an effort 'to unduly p
vent or lessen competition,' for even if the res
should be the lessening of speculation, substant
competition in the purchase would still exist and
the market-price, which, according to the eviden
is not fixed and cannot be fixed in this Province. T
'stabilizing of the wheat market' cannot be said
'unduly prevent and lessen competition,' for wh
ever stabilizing of the wheat market can be acco
plished by placing the whole wheat crop of th
Province in the hands of a central selling agen
must, in my opinion, be confined within very narr
limits, for there must still exist the same compe
tion for the purchase of the crop from outside t
Province and this competition, depending upon t
supply elsewhere, must largely determine the pri
Moreover, considering the whole evidence, I mu
say that I cannot find anything which would wa
rant a finding that the intention of the plaintiff
entering into the contract in question was to 'unre
sonably enhance the price' of wheat, or to 'undu
prevent or lessen competition' (*A. G. Australia
Adelaide SS. Co.* (1913) A. C. 781)."

**B. The counterclaim for a declaration of rights as
the Anti-Trust Law is improper pleading.**

The lower court struck out the third paragraph of t
amended answer and counterclaim which begins at pa
19 of the Record, on the ground that it was improp
pleading. This action was affirmed by the Court of A
peals. We submit that this action was clearly right.

This pleading was not an answer to the action for
penalty under Section 27 of the Bingham Act but w
an attempt to secure a so-called declaration of righ
under the *Declaratory Judgment Law of Kentucky.*

The plaintiff in error alleged in this paragraph that it is impossible for it to continue business or operate its business without serious financial loss amounting to confiscation of its rights, business and property, "*unless a declaration of its rights and duties under said act of the General Assembly is made by this court. Defendant now makes its application to this court, upon its counterclaim, in accordance with the provisions of Chapter 83 of the Acts of 1922 of the General Assembly of Kentucky, known as the Declaratory Judgment Law, for the purpose of securing a declaration of its rights and duties under said Bingham Co-operative Marketing Act, in relation to the common law and the State and Federal constitutions, as well as the Sherman Anti-Trust Law, and for the purpose of having this court determine whether in the conduct of its business it will be necessary for it to comply with the provisions of said Bingham Co-operative Marketing Act, or whether it is invalid in whole or part, and if so, in what part.*" (R. 20.)

The plaintiff in error also says "that in the conducting and selling of leaf tobacco at public auction it is necessary for it to know whether said Act of 1922 is valid or invalid and whether this plaintiff is liable for the crimes therein denounced and subject to the punishment and penalties prescribed in said Act of 1922." (R. 20.)

The prayer of the so-called counterclaim reads as follows:

> "Defendant states that no other persons are necessary parties to this suit; and that a copy of this answer and counterclaim, in accordance with the law, will be served upon the attorney general of the State of Kentucky, who has the right to be heard in his own name herein.
>
> Wherefore, defendant upon its amended answer and counterclaim against plaintiff herein prays this court by its judgment to declare its rights and duties

under said Bingham Act of 1922, in relation to the constitution, State & Federal, and the Sherman Anti-Trust Law as amended; and that a judgment be entered declaring said Bingham Act of 1922 invalid and especially sections 26 and 27 thereof and for a judgment for treble damages under the Sherman Anti-Trust Law as amended in the sum of $60,000.00 and reasonable attorneys fee and costs and all proper relief." (R. 24.)

A somewhat similar pleading by the same plaintiff in error and by the same counsel and in which the same language was used in part, was before this court in *Liberty Warehouse et al, Plaintiff in error* v. *B. S. Grannis, Defendant in error*, No. 60, October term, 1926. In that case, this court held that the Federal Courts had no jurisdiction over such an action. In the opinion rendered January 3, 1927, Mr. Justice Sutherland said:

"The sole purpose of the petition, as shown by its express allegations, is to obtain a declaration from the District Court of the rights and duties of the plaintiffs under the Act of 1924, and a determination of the extent to which they must comply with its provisions in the conduct of their business. • • •

The question whether the District Court has jurisdiction to entertain such a petition for a declaration of rights admits of but one answer under the prior decisions of this Court.

We need not review these at length. It suffices to say that in the light of the decisions in *Muskrat* v. *United States*, 219 U. S. 346, 357; *Fairchild* v. *Hughes*, 258 U. S. 126, 129; *Texas* v. *Interstate Commerce Comm.* 258 U. S. 158, 162; *Keller* v. *Potomac Elec. Co.* 261 U. S. 428, 444; *Massachusetts* v. *Mellon*, 262 U. S. 447, 488; *New Jersey* v. *Sargent*, 269 U. S. 328, 330; and *Postum Cereal Co.* v. *California Fig Nut Co.*, this day decided—in which the principles stated in earlier cases are considered and applied—it is not open to question that the judicial power vested by Article III of the Constitution in this Court and the inferior courts of the United States established by Congress thereunder, extends only to

'cases' and 'controversies' in which the claims of litigants are brought before them for determination by such regular proceedings as are established for the protection and enforcement of rights, or the prevention, redress, or punishment of wrongs; and that their jurisdiction is limited to cases and controversies presented in such form, with adverse litigants, that the judicial power is capable of acting upon them, and pronouncing and carrying into effect a judgment between the parties, and does not extend to the determination of abstract questions or issues framed for the purpose of invoking the advice of the court without real parties or a real case.

• • • • • •

It follows necessarily from these decisions that the District Court, as a court of the United States established under Article III of the Constitution, had no jurisdiction to entertain the petition for the declaratory judgment."

It should require little argument to support the proposition that a simple action for a penalty under Section 27 of the Bingham Act cannot be converted by a so-called counterclaim into an action for a declaratory judgment under the Kentucky Declaratory Judgment Law raising all kinds of legal and constitutional questions as to the Co-operative Marketing Act, the Co-operative Marketing Contract, and the activities of the Co-operative Marketing Association, which are wholly foreign to the issue presented by the petition.

Section 96 of Carroll's Kentucky Code reads:

"A counterclaim is a cause of action in favor of a defendant against a plaintiff, or against him and another, which arises out of his contract, or transactions stated in the petition as the foundation of the plaintiff's claim, or which is connected with the subject of the action."

It is obvious that the numerous matters set forth in the counterclaim do not arise out of the particular trans-

action complained of in the petition and are not c
nected with it.

Nor can a counterclaim for damages be interposed t
statutory action for a penalty. *Woodward* v. *Cond*
33 Mo. App. 147; *Moore* v. *Trimmer*, 6 N. Y. S. 430.

As to the necessity of the counterclaim arising out
the transaction set forth in the petition, see *Pomer*
Code Remedies, 4th Edition 927; *Rennenbaum* v. *Atk*
son, 45 S. W. 874; *Abernathy* v. *Meyer*, 99 S. W. 942.

Nor is such a counterclaim authorized by the Kentuc
Declaratory Judgment Law which is embodied in t
Acts of Kentucky (1922) Chap. 83, p. 235.

This Act contemplates a direct action for the purpo
of securing a so-called declaratory judgment. It pr
vides that such action must be commenced "by mea
of a *petition* on either the law or equity side of t
court." (§ 3.)

The word "petition" has a distinct meaning und
the Kentucky Practice and refers to the pleading r
quired to commence an original action.

There is no provision in the law for seeking a decla
atory judgment on a counterclaim.

Furthermore, the Declaratory Judgment Law provid
that:

> "The court may refuse to exercise the power
> declare rights, duties, or other legal relations • •
> in any case where the declaration or construction
> not necessary or proper at the time under all th
> circumstances." (§ 6.)

Under this section even if the pleading was prope
the court had discretion to refuse to grant a declarato
judgment. The court did refuse to exercise that pow
in this case and its discretion, we respectfully submit,
not reviewable in this court.

An examination of the entire pleading will indicate that the declaration of rights coupled with the request for treble damages under the Sherman Anti-Trust Law was not necessary or proper at the time and under the circumstances and was therefore properly struck from the pleading.

In addition, all questions concerning which a declaration of rights was asked were settled in the prior decisions of the Kentucky Court of Appeals in the *Potter case, supra*, and in the *Jewell Tobacco Warehouse Case, supra*, so that another declaration of rights was unnecessary and under the settled Kentucky practice could not be granted because, *first*, the questions were stare decisis; and *second*, no actual controversy existed.

Proctor et al v. *Avondale Heights Co.* (1923) 200 Ky. 447.

Shearer & Ramsey v. *Becker et al*, (1925) 207 Ky. 455.

Axton v. *Goodman*, (1924) 205 Ky. 382; 265 S. W. 806.

Kelly v. *Jackson*, (1925) 206 Ky. 815; 268 S. W. 539.

Ezzell v. *Exal*, (1925) 207 Ky. 615; 269 S. W. 752.

C. The state courts have no jurisdiction of an action for treble damages under the Sherman Anti-Trust Law.

The plaintiff in error in its counterclaim set up that by reason of the number of tobacco growers who had joined the Co-operative Association, the plaintiff in error had lost trade and that the earning power of its warehouses was thereby injured as a result of the alleged unlawful combination and trust "to defendant's three-fold damages in the sum of $60,000." (R. 24.)

In the prayer above quoted the plaintiffs pray for declaratory judgment "and for a judgment for trebl damages under the Sherman Anti-Trust Law as amende in the sum of $60,000 and reasonable attorney's fees an costs and all proper relief."

An action for treble damages under the Sherman Anti Trust Law must be brought in the United States Distric Court under the plain terms of the Act; and the Kentuck courts have no jurisdiction of the action set forth in th alleged counterclaim.

The Sherman Anti-Trust Law specifically provides

> "Any person who shall be injured in his busines or property by any other person or corporation b reason of anything forbidden or declared to be un lawful by this Act, *may sue therefor in any Circu Court (now District Court) of the United States i the district in which the defendant resides or i found*, without respect to the amount in controversy and shall recover three-fold the damages by him sus tained, and the costs of suit, including a reasonabl attorney's fee (July 2, 1890 c. 647, Sec. 7, 26 Stat 210 U. S. Comp. Stat. 1918, § 8829)."

The Clayton Act likewise provides:

> "Any person who shall be injured in his busines or property by reason of anything forbidden in th anti-trust laws *may sue therefor in any distric court of the United States in the district in whic the defendant resides or is found or has an agent* without respect to the amount in controversy, an shall recover threefold the damages by him sus tained, and the cost of suit, including a reasonabl attorney's fee. (Oct. 15, 1914, c. 323, § 4, 38 Stat 731)." (U. S. Comp. Stat. 1918, § 8835d.)

See also § 77 Act of August 27, 1894, c. 349; 28 Stat 570; U. S. Comp. Stat. (1918) § 8835.

Paragraph 23 of Section 24 of the Judicial Code pro vides that the district courts of the United States shal have original jurisdiction of "all suits and proceeding

arising under any law to protect trade and commerce against restraints and monopolies."

This court has specifically said that actions for treble damages under Section 7 of the Sherman Anti-Trust Act can only be brought in a District Court of the United States.

In *Blumenstock Bros. Advertising Agency* v. *Curtis Publishing Co.* (1920) 252 U. S. 436; 64 L. ed. 649, Mr. Justice Day said, at page 440:

> "The Sherman Anti-Trust Act (§ 7) created a cause of action in favor of any person to recover by suit in any district court of the United States, in the district in which the defendant resides or is found, threefold damages for injury to his business or property by reason of anything forbidden and declared unlawful in the act. In order to maintain a suit under this act the complaint must state a substantial case arising thereunder. *The action is wholly statutory, and can only be brought in a district court of the United States, and it is essential to the jurisdiction of the court in such cases that a substantial cause of action within the statute be set up.*"

In *Locue & Co.* v. *Laudor*, (1904) 130 Fed. Rep. 633 (affirmed 209 Fed. Rep. 721; 208 U. S. 274; 235 U. S. 522), the pendency of an action in a state court to recover treble damages under Section 7 of the Anti-Trust Act was pleaded in abatement of the action in the Federal Court. However, the court held that this plea was not good because the state court had no jurisdiction to entertain such an action. In so holding the court said.

> "In the Sherman Act the Congress has established a new method of obtaining redress in a matter relating to interstate trade, over which its jurisdiction is plenary. It has directed the parties to the Circuit Court for the vindication of their rights.
>
> Before sustaining the defendants' plea, it is obviously necessary to accept their preliminary conten-

> tion that the state court can, in the trial of the ca
> therein pending, invoke section 7 of the anti-tr
> act (Act July 2, 1890, c. 647, 26 Stat. 210 (U.
> Comp. St. 1901, p. 3202)), and under its author
> assess treble damages. It is not believed that s
> power exists in the state court. Congress was de
> ing with a delicate problem when it gave us
> Sherman act, and it would seem to have been
> thought that since a subject was up over which
> federal jurisdiction was absolute it would be well
> intrust its exploitation to the federal judiciary."

The view of this case taken by the lower courts w
affirmed by this court.

The general rule is well stated in 19 R. C. L. at S
tion 57, as follows:

> "The liability imposed by the (Sherman) Act
> not be enforced by a proceeding in equity, or oth
> wise than through the verdict of a jury in a c
> mon law court. Recovery can be had only by dir
> action, and not by way of setoff in an action brou
> for the price of goods by a company illegally form
> in violation of the act. • • • *The action to*
> *cover three-fold damages is within the exclusive j*
> *isdiction of the Federal courts.*" (Italics ours.

Attempts to counterclaim damages under the Sherm
Anti-Trust Law in actions brought by combinations
recover the purchase price of goods have frequently b
held improper on the ground that such action must b
direct action and cannot be set up collaterally by way
counterclaim.

The present action is to recover the penalty provi
by statute for the commission of a tort. It is not an
tion to enforce the Co-operative Marketing Contract o
compel the carrying out of the agreement or combinat
which the plaintiff in error claims violates the Anti-Tr
Law. The so-called counterclaim does not grow out
the transaction set forth in the petition. It is pur
collateral thereto.

In *Connolly* v. *Union Sewer Pipe Co.* (1901) 184 U. S. 540; 46 L. ed. 679, Harlan, J. said on page 551, that the defendants could not refuse to pay for what they had bought on the ground that the seventh section of the Sherman Act permitted a person injured in his business to recover treble damages because "it is sufficient to say that the action which is authorized must be a direct one, and the damages claimed cannot be set off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and other corporations, firms or companies."

In *Wilder Mfg. Co.* v. *Corn Products Refining Co.* (1914) 236 U. S. 165; 59 L. ed. 521, the Refining Company brought suit to recover the price of corn syrup which the Manufacturing Company had bought, consumed and not paid for. The Manufacturing Company set up as a defense the illegality of the Refining Company under the Sherman Anti-Trust Act. On motion this answer was stricken out as not stating a defense. The case was brought to this court because of an alleged failure to give effect to the Anti-Trust Act. This court affirmed the Georgia courts and held that unless the contract for the purchase of goods was inherently illegal, the alleged violation of the Anti-Trust Law was not a defense. The court distinguished *Continental Wall Paper Co.* v. *Voight*, 212 U. S. 227; 53 L. ed. 486, on the ground that the transaction there sued on was inherently illegal. The court said that individuals could not be permitted to set up such claims in the state courts because "the right claimed would defeat the jurisdiction conferred by the statute on the courts of the United States." The court concludes that:

> "There is no support afforded to the proposition that the anti-trust act authorizes the direct or in-

> direct suggestion of the illegal existence of a corporation as a means of defense to a suit brought by such corporation on an otherwise inherently legal and enforceable contract, but, on the contrary, that the provisions of the act add cogency to the principles of general law on the subject, and therefore make more imperative the duty in directly or indirectly to permit such a defense to a suit to enforce such a contract. • • •"

The most recent decision directly in point arose in a case involving the California Prune and Apricot Growers Association, namely *Wm. A. Higgins & Co.* v. *California Prune & Apricot Growers, Inc.* C. C. A. 2, decided December, 1926 [not yet officially reported]. In that case the California Prune & Apricot Growers Co-operative Association brought suit against Higgins & Company to recover damages for the repudiation of a contract for the sale of prunes. The Prune and Apricot Growers Co-operative Association was organized under the Co-operative Marketing Law of California and used the standard form of Co-operative Marketing Contracts which is in all respects similar to that used by the defendant in error in the case at bar. More than three-fourths of all the prune and apricot growers of California were members of the Prune and Apricot Growers Association. The defendant, Higgins & Company, filed a counter claim alleging that the Prune and Apricot Growers Co-operative Association was an illegal monopoly in violation of the Sherman Anti-Trust Law. The Court of Appeals for the Second Circuit (Manton, Mack and Hand) held against this claim. In the opinion, the court said:

> "The argument that error was committed in refusing to allow the plaintiffs-in-error to introduce evidence as to its counterclaim showing that the defendant-in-error was a monopoly is without force. There was no proof that the contracts in suit were connected with or were an inherent part of any con-

spiracy to restrain trade. Proof thereof was inadmissible. The argument that the contracts themselves contained any specific element of illegality or were an inherent and integral part of a scheme to monopolize interstate commerce in prunes, is equally without force."

To the same effect are *Small Co.* v. *Lamborn & Co.*, 267 U. S. 248; *Millikeh-Thompson Co.* v. *American Sugar Refining Co.*, 9 F. (2d) 809.

We therefore submit that the court was right in striking out the counterclaim for treble damages under the Sherman Anti-Trust Act for the reason, *first*, that the state court has no jurisdiction of such action; and *second*, the alleged counterclaim was collateral to and did not inhere in the cause of action asserted by the plaintiff in the court below.

D. A tortious intermeddler with the contracts between defendant in error and its members cannot raise the question of their illegality.

The claim that the Burley Tobacco Growers Co-operative Association and the contract of such Association with its members violates the Anti-Trust Law is not made by any public official or representative of the public.

The alleged illegality of the Association and of the co-operative marketing contract is not asserted by any member of the Association or by any grower of Burley tobacco whether a member or not.

The only person who alleges a violation of the Anti-Trust Law and the illegality of the co-operative contract is an admitted intermeddler with such contract.

The claim is made only by a party who has wrongfully and maliciously interferred with a contract between the Association and a member, the validity of which is not questioned by the member.

Under such circumstances the law does not permit the wrongdoer to assert the invalidity of a contract of which he has maliciously induced a breach.

Upon this point the Supreme Court of Wisconsin said in *Northern Wisconsin Co-op. Tobacco Pool* v. *Bekkedal, et al.* (1923), 182 Wis. 571, 197 N. W. 936:

> "It strikes us that the question whether these contracts are in all respects technically valid, or whether the contracting parties could, if they were so disposed, defend against them, is a matter with which the defendants are not concerned, and which they ought not to be permitted to raise. The contracts were treated as valid and subsisting by both parties thereto. The plaintiff had proceeded on the theory that it had the requisite number of contracts. It so notified all of its contracting members in August, 1922. Not a single one of the members questioned that fact. The plaintiff proceeded to finance itself, and to dispose of the crop which these contracts assured to it. The contracting members planned on delivering their respective crops to the plaintiff corporation in accordance with their agreement. All parties acquiesced in the validity of the contracts. Under such circumstances we are unable to perceive any legitimate reason for permitting a mere intermeddler with relations thus created to assert the right to challenge the validity of these contracts. If the immediate parties saw fit to treat them as legal contracts, defendants' interference with relations thereby created is no less immoral because the growing members might have had a legal defense thereto. This conclusion is supported by *Rice* v. *Manley*, 66 N. Y. 82, and *Lasky Feature Play Co.* v. *William Fox Vaudeville Co.*, 93 Misc. Rep. 364, 157 N. Y. Supp. 106, affirmed without opinion in 174 App. Div. 872, 159 N. Y. Supp. 1120."

For all the above reasons the courts below were justified in holding as a matter of law that the answer and alleged counterclaim did not present a good defense to the action brought by the defendant in error.

IV.

SECTION 27 OF THE CO-OPERATIVE MARKETING ACT OF KENTUCKY IS NOT AN UNLAWFUL REGULATION OF INTERSTATE COMMERCE.

Roman Numeral IV of the brief for plaintiff in error (pp. 27-38) is headed "Section 27 of the Bingham Act undertakes to regulate interstate commerce." The discussion which follows is devoted to the claim that the Co-operative Marketing Act and particularly Section 27 is an unlawful attempt by the state of Kentucky to regulate interstate commerce. (Brief, pp. 27-38.)

Our answer to this claim is (a) interstate commerce is not involved in this case; and (b) in so far as interstate commerce by co-operative associations is concerned, the same is specifically sanctioned by Federal legislation.

A. Interstate commerce not involved.

Section 27 by its terms applies only to warehousemen within the state of Kentucky who induce a member of a Kentucky co-operative association to break his marketing contract and receive such member's products for sale or auction in Kentucky. Section 27 reads in part:

> "Any person, firm or corporation conducting a warehouse *within the state of Kentucky* who solicits or persuades or permits any member of any association *organized hereunder* to breach his marketing contract with the association by accepting or receiving such member's products for sale or for auction or for display for sale, * * * shall be liable, etc. * * *"

This section is not a regulation of commerce at all. It applies only to the conduct of a warehouseman within Kentucky. It imposes a penalty upon a Kentucky warehouseman who does certain overt acts to induce a breach

of contract and aid a co-operative member in disposing of his property contrary to law. It is directed against conduct not commerce.

No interstate transaction of any kind is involved in the petition or is set forth in the answer. The petition filed in the Circuit Court sets forth that the plaintiff is a Kentucky corporation. It sets forth that Mike Kielman was a member of such association. He signed the standard form of co-operative marketing contract prepared for use in Kentucky and presumably he was a Kentucky member of a Kentucky corporation.

The petition further states that he produced 2,000 pounds of tobacco which was delivered to the defendant at its Kentucky warehouse and was actually sold at Maysville, Kentucky. (R. 2.)

Nowhere in the answer or so-called counter-claim does the defendant assert that any part of the matters described in the petition occurred outside of Kentucky. The only reference in the pleadings to any interstate business is the following statement in the third paragraph of the amended answer and counterclaim:

> "Defendant states that in the conduct of said business dealings by it, tobacco is sold by a public auction on the floors of said Liberty Warehouse Company; (a Kentucky corporation) that the larger part of said tobacco is grown in Kentucky; but that a part of same is shipped into Kentucky from the adjoining state or other states and to such an extent defendant is engaged in interstate commerce." (R 19-20; parenthesis ours.)

But there is no claim that the tobacco of Mike Kielman was produced or acquired outside of the state of Kentucky or that the particular tobacco which the defendant was found guilty of having unlawfully diverted was either received from outside the state or was sold for transportation outside the state.

In other words this case concerns a Kentucky transaction in which both plaintiff and defendant are Kentucky corporations and in which all parties are residents of Kentucky. Both plaintiff and defendant are Kentucky corporations. The tobacco was grown in Kentucky and sold in Kentucky. There is nothing to indicate that it did not remain permanently in Kentucky.

We are therefore at a loss to understand how interstate commerce is involved or interfered with. The Court of Appeals of Kentucky was fully justified in the following language of its opinion upon this point:

> "Neither do we attach any importance to the interstate commerce feature attempted to be injected into the case by counsel for defendant. In the first place, it is not shown that the tobacco of the member whose contract defendant is charged with assisting to violate ever moved in interstate commerce; *i. e.*, whether he produced it in another state and moved it to defendant's warehouse, or whether it was produced in this state and so moved. Again, it is extremely doubtful if it continued in interstate commerce after it had been removed from another state (if that was the fact) to defendant's warehouse. Section 27 of the act does not attempt to penalize any of the steps necessary for such removal, and when the tobacco was deposited in defendant's warehouse the latter would not be liable to the penalties of the act, unless it did something subsequent thereto to complete the violation of the member's contract with the association. Whatever, therefore, was thereafter done, would be in relation to a localized commodity and would appear to not involve the questiton of interstate commerce. But beyond all that, we have seen that the Clayton Amendment to the Sherman Anti-Trust Law excludes such products from the provisions of the latter act, and thereby Congress relinquished its superior right to regulate interstate commerce with reference to them and restored the right of the states to do so as long as that condition existed."

Even if it could be shown that tobacco was shipped to defendant's warehouse from other states, there would be no interference or unlawful regulation of interstate commerce because, *first*, the act only applies to tortious conduct of a warehouseman in Kentucky; and *second*, Kentucky has a right to regulate the sales of tobacco by warehouses at public auction within the state.

Such regulations do not unlawfully burden interstate commerce. The right of the state to regulate sales at auctiton even though the goods to be sold at auction are shipped into the state from other states was settled in *Woodruff* v. *Parham* (1869), 8 Wall. 123, 19 L. ed. 382, which has been repeatedly followed in:

Wagner v. *Covington* (1919), 251 U. S. 95, at 102.

Texas Co. v. *Brown* (1922), 258 U. S. 466, at 476; 66 L. ed. 721, at 726.

Bacon v. *Illinois* (1913), 227 U. S. 504, at 513, 516, 517; 57 L. ed. 619.

Brown-Foreman Co. v. *Kentucky* (1910), 217 U. S. 563, at 575; 54 L. ed. 883, at 888.

American Steel, etc., Co. v. *Speed* (1904), 192 U. S. 500, at 521; 48 L. ed. 538, at 547.

Austin v. *Tennessee* (1900), 179 U. S. 343, at 351.

Howe Machine Co. v. *Gage* (1879), 100 U. S. 677.

Emert v. *Missouri* (1895), 156 U. S. 296, at 314, 316; 39 L. ed. 430, at 435, 436.

Brown v. *Houston* (1885), 114 U. S. 628, 630, 634; 29 L. ed. 259.

Pittsburgh, etc., Coal Co. v. *Louisiana* (1895), 156 U. S. 600; 39 L. ed. 544.

In *Hopkins* v. *U. S.* (1898), 171 U. S. 578; 43 L. ed. 290, it was held that the business of buying and selling live stock at stockyards in a city by commission merchants and members of a stock exchange is not interstate commerce, although most of the purchases and sales were of live stock sent from other states.

In *Hygrade Provision Co.* v. *Sherman* (1925), 266 U. S. 497; 69 L. ed. 402, the court held that a New York law making it a crime to sell kosher food products without having the same properly labelled was not an unconstitutional interference with the interstate business of a Massachusetts corporation conducting a general provision business including the shipment and sale of original packages into New York. Justice Sutherland said at page 503:

> "It is enough to say that the statutes now assailed are not aimed at interstate commerce, do not impose a direct burden upon such commerce, make no discrimination against it, are fairly within the range of the police power of the state, bear a reasonable relation to the legitimate purpose of the enactments, and do not conflict with any Congressional legislation. Under these circumstances they are not invalid because they may incidentally affect interstate commerce. *Sligh* v. *Kirkwood*, 237 U. S. 52; 59 L. ed. 835; *Savage* v. *Jones*, 225 U. S. 501, 56 L. ed. 1182."

In *Merchants Exchange* v. *Missouri* (1919), 248 U. S. 365; 63 L. ed. 300, it was held that a Missouri law providing that hay and grain stored in warehouses must be weighed by public weighers, did not burden interstate commerce although the grain was received from and shipped to points without the state. The court said:

> "Section 63 does not violate the commerce clause of the Constitution. The contention that it does was rested below solely on the ground that the prohibition, as applied to grain received from or shipped to

points without the state, burdens interstate commerce. It clearly does not."

Other cases holding that when goods are shipped from outside the state for sale within the state, the interstate journey is ended and sales by public warehouses or at public auctions may be taxed and/or regulated by the state, are:

Susquehanna Coal Co. v. *So. Amboy* (1913), 228 U. S. 665; 57 L. ed. 1015.

Crescent Cotton Oil Co. v. *Miss.* (1921), 257 U. S. 129.

Singer Sewing Machine Co. v. *Brickell* (1914), 233 U. S. 304; 58 L. ed. 974.

This case falls squarely within the rule laid down in *Blumenstock Bros. Advertising Agency* v. *Curtis Publ. Co.* (1920), 252 U. S. 436, in which the court, after reviewing the cases said, at page 444:

"Applying the principles of these cases, it is abundantly established that there is no ground for claiming that the transactions which are the basis of the present suit, concerning advertising in journals to be subsequently distributed in interstate commerce, are contracts which directly affect such commerce. Their incidental relation thereto cannot lay the ground work for such contentions as are undertaken to be here maintained under Sec. 7 of the Sherman Anti-Trust Act. The court was right in dismissing the suit. Affirmed."

B. Interstate activities of co-operative association sanctioned by Federal law.

There is no conflict between the state and the Federal law with respect to co-operative associations.

If it be conceded for the sake of argument that we are dealing with interstate commerce, then the validity

of the co-operative associations engaged in interstate commerce is firmly established by the Federal legislation to which we have previously referred.

Section 6 of the Clayton Act, *supra*, provides that nothing contained in the Anti-Trust Laws shall be construed to forbid the existence and operation of agricultural associations instituted for mutual help and not conducted for profit or to forbid such organizations or individual members "from lawfully carrying out the legitimate objects thereof".

Section 1 of the Capper-Volstead Act, *supra*, specifically provides that persons engaged in the production of agricultural products may act together in associations "in collectively processing, preparing for market, handling, *and marketing in interstate* and *foreign commerce* such products of persons so engaged."

This act further provides that such associations "may make the necessary contracts and agreements to effect such purposes."

In view of the above Federal legislation, any state legislation or action in conflict therewith or which would prevent co-operative associations from engaging in interstate commerce, would be invalid. *Nebraska Wheat Growers Ass'n* v. *Norquest* (1925), Nebr. 204 N. W. 798.

The fact that Congress has passed legislation sanctioning and encouraging the co-operative marketing of farm products does not prevent the states from enacting similar legislation in harmony with and in aid of the national program with respect to agriculture. On the contrary it is well settled that such legislation should be upheld.

In *Read* v. *Colo.* (1902) 187 U. S. 137; 47 L. ed. 108, it was claimed that the state could not enact legislation to

prevent the importation of diseased cattle because of the Animal Industry Act of the United States. However, the court held that Congress had not by any statute covered the whole subject of the transportation of live stock among the several states and had left a wide field for the exercise of state power to protect their domestic animals against contagious diseases. The court held that the Kentucky statute did nothing more than "establish a rule of civil liability, in that state," and affected no regulation of interstate commerce that Congress had prescribed.

The court approved of the prior case of *Missouri Kansas & Texas Railway Co.* v. *Haber* (1898) 169 U. S. 613, 42 L. ed. 878 in which the court said of the same legislation, pp. 625-626:

> "In fact, the state law is in aid of the objects which Congress had in view when it passed the Animal Industry Act. It was passed in execution of a power with which the state did not part when entering the Union, namely the power to protect the people in the enjoyment of their rights and property and to provide for the redress of wrongs within its remedies."

More need not be said because the State and Federal legislation are in complete harmony and it is immaterial whether the questions at issue be considered as intrastate or interstate.

V.

THE BRIEF OF PLAINTIFF IN ERROR CONSIDERED

There are a number of inaccuracies in the brief of the plaintiff in error some of which we have endeavored to correct in the course of this brief.

For example, at the bottom of page 34 of the brief

of plaintiff in error the statement is made "since the act in question, under regulations therein prescribed and penalties denounced, forbids warehousemen in all the states of the Union conducting warehouses in Kentucky from shipping their products of Burley Co-operative Growers into Kentucky for sale at public auction over the floors of loose leaf tobacco warehouses, regardless of the nature of the contracts under which the shipments are made, or the manner and condition in which the products are shipped, it follows that the Act in question directly interferes with the transportation, by land or water from one state to another, which transportation is itself interstate commerce."

Of course there is nothing corresponding to the above paragraph in the Bingham Co-operative Marketing Act.

At page 40 it is suggested that the defendant in error, through the co-operative marketing system, endeavors to fix the price of tobacco to the *ultimate consumer*.

At page 2 there is another statement about alleged price-fixing by an executive committee of the defendant in error.

There is nothing in the record to substantiate these unfair and untrue inferences. Prices are determined by market conditions and are arrived at by the usual methods of bargain and sale between the Co-operative Association, acting on behalf of the sellers, and the buyers of the tobacco.

On page 2 the further statement is made that members of the Association are not permitted to buy products in competition with each other.

There is no restraint of any kind upon the buying of products by members of the defendant in error or upon their production of products. Members are free to buy

what, where and when they will. They are equally f
with respect to the production of products. The only
ligation of the member of a co-operative associat
arises from his own voluntary contract. That contr
relates only to co-operative *selling*, not to buying or p
ducing.

Considerable complaint is made in the brief becau
the court took judicial knowledge of the history of
country and of current events and particularly of
agricultural depression existing in the state in wh
the court sat. (Brief, defendant in error, p. 13-17.)
believe that there is no doubt of the right of the co
to take judicial notice of the history of the country a
of such wide-spread and notorious facts as the con
tions existing in the basic agricultural product of
State of Kentucky.

Professor Wigmore, in discussing the right of
courts to take judicial notice of such matters, says,
Vol. 4, Wigmore on Evidence, § 2580:

> "Applying the general principle, especially in
> gard to the element of notoriousness, courts a
> found noticing from time to time, a varied array
> unquestionable facts, ranging throughout the da
> of commerce, industry, history, and natural scien
> It is unprofitable, as well as impracticable, to se
> to connect them by precedents and distinctions; f
> the notoriousness of the truth varies much with di
> ferences of period and place."

A long list of authorities is cited at pages 3615-16
support of the text.

In *Minnesota Wheat Growers Co-op. Ass'n* v. *Hu*
gins (1925) 162 Minn. 471; 203 N. W. 420, the court sai

> "This court is justified in taking judicial know
> edge, as it does, of the economic conditions of th
> farmer in our country, because they are matters
> general knowledge, history, and public interes

State ex rel. Johnson v. *Grindeland (in re Cons. Ditch No. 1)* 157 Minn. 108, 195 N. W. 781; *Tobacco G. Co-op. Ass'n* v. *Jones*, 185 N. C. 265, 117 S. E. 174, 33 A. L. R. 231."

In *Tobacco Growers Co-operative Association* v. *Jones* (1923) 185 N. C. 265; 117 S. E. 174, the court took judicial notice of a combination among the big tobacco manufacturers; and said on page 280:

> "Similar rulings have been made in many cases that the courts would take judicial notice of these well known facts of universal knowledge. Every word of these decisions apply with the utmost force to the situation in this state, where these facts existed to the extremest degree, with the resulting injury to the tobacco farmers of the state • • •"

In *Burley Tobacco Co.* v. *Gillaspy* (1912) 51 Ind. App. 593; 100 N. E. 89, the court said:

> "To hold that courts do not judicially know that in the year 1909 there was in this country a combination among the manufacturers of tobacco which controlled the leaf tobacco market, and known as the tobacco trust, would be to impute to courts a lack of knowledge possessed by the public generally."

In *Bristow First National Bank* v. *Rogers* (1909) 24 Ok. 357; 103 Pac. 582, the court said, on page 360:

> "• • • but courts will take judicial notice of the season and the course of nature, which includes the general course of agriculture and the growth of staple crops of the country."

In Matter of Application of Jacobs (1885) 98 N. Y. 98, the court took judicial notice of the nature, quality and use of tobacco.

In *Austin* v. *Tennessee* (1900) 179 U. S. 343; 45 L. ed. 224, on page 345, this court took judicial notice of the various uses of tobacco and of its alleged noxious use in cigarettes.

Frequent instances may be cited in which this court has taken judicial notice of various well-known facts. Judicial notice was taken in the following cases:

Whitney v. *U. S.* 167 U. S. 529; 42 L. ed. 263. (That pasturage upon unenclosed western land is slight evidence of possession.)

Leovey v. *U. S.* 177 U. S. 621; 44 L. ed. 914. (That the public health is deeply concerned in the regulation of swamp lands.)

Territory of New Mexico v. *Denver & G. R. R. Co.* 203 U. S. 38; 51 L. ed. 78. (That in parts of the West cattle must be branded in order to identify their ownership and that they run at large without other means of identification.)

U. S. v. *Hamburg, etc.* 239 U. S. 466; 60 L. ed. 387 (of the existence of the European War).

Sligh v. *Kirkwood* (1913) 237 U. S. 52; 59 L. ed. 835 (that the raising of citrus fruits is one of the great industries of the state of Florida).

Municipality of Ponce v. *Roman Catholic Apostolic Church* (1908) 210 U. S. 296 (of the history of Porto Rico and its legal and political institutions).

Gray v. *Chicago N. W. R. Co.* (1915) 237 U. S. 399; 59 L. ed. 1018 (that the great railroad systems continuously engage in interstate and intrastate commerce).

Walters-Pierce Oil Co. v. *Deselms Co.* (1909) 212 U. S. 159; 53 L. ed. 453 (of a general custom to use coal oil in certain communities in building fires).

Little v. *Williams,* (1913) 231 U. S. 335; 58 L.

ed. 256 (of general system of government surveys).

Otis & Gassman v. *Parker*, (1903) 187 U. S. 606, 610; 47 L. ed. 323 (that trading in certain stocks was apt to cause gambling).

Booth v. *Illinois*, 184 U. S. 425 (of custom with respect to purchase and sale of grain futures).

Jacobson v. *Mass.* (1905) 197 U. S. 11, 30; 49 L. ed. 643 (of common belief in preventive qualities of vaccination in treatment of small-pox).

McArdle v. *Indianapolis Water Co.* U. S.; 71 L. ed. 154 (decided November 22, 1926) at page 159 (of the general upward trend of prices of labor and material since 1921).

We have replied to all the cases cited in the brief for plaintiff in error which are in point or bear upon the questions before this court.

However, an examination of most of the cases cited show that the same relate to situations so widely different from the case at bar that it would improperly encumber this brief to discuss the same separately; and in many instances we have found it impossible to tell where the argument of the brief ends and the quotation begins, or vice versa, as the quotations are not indented or clearly indicated.

CONCLUSION.

This is a long brief. But the issues involved are large in their importance to the welfare of agriculture in the United States.

We have felt it our duty to place before this court the status of the law with respect to the co-operative marketing of agricultural products in each of the states,

which has found judicial expression chiefly since the close of the World War.

This review of the law shows that in every state, co-operative marketing organizations of the character of defendant in error, are approved and encouraged.

There is not a single decision or a single state which holds that the standard form of co-operative marketing law or contract violates any State or Federal law.

Throughout this brief we have adhered closely to decided precedent and legal logic but we are not unmindful of the human and social values which are involved in the questions discussed.

It is not too much to say that the decision of this case will profoundly affect agricultural prosperity and the development of sound business methods in the marketing of farm products throughout the United States.

More than two and a half million farm families are directly concerned as members of co-operative marketing associations.

In his annual message to Congress on December 7, 1926, the President said:

> "The development of sound and strong co-operative associations is of fundamental importance to our agriculture. It is encouraging to note, therefore, that a vigorous and healthy growth in the co-operative movement is continuing. Co-operative associations reporting to the Department of Agriculture at the end of 1925 had on their membership rolls a total of 2,700,000 producers. Their total business in 1925 amounted to approximately $2,400,000,000, compared with $635,800,000 in 1915. Legislative action to assist co-operative associations and supplement their efforts was passed at the last session of Congress. * * *
>
> Attention is again directed to the surplus problem of agriculture by the present cotton situation. Surpluses often affect prices of various farm commodi-

ties in a disastrous manner, and the problem urgently demands a solution. * * * In my opinion, co-operative marketing associations will be important aids to the ultimate solution of the problem."

The Co-operative Marketing Association represents the farmer's effort to help himself without governmental subsidy. The Co-operative Association enables the farmer to adapt to agricultural conditions the advantages of collective action which have contributed so much to the prosperity of American business and American labor.

We submit that there is nothing in the American Constitution or the Laws of the United States which denies to the farmer the right to collectively work out his own problems, which capital, business and labor now enjoy.

The success of co-operation among farmers depends upon the inviolability of the Co-operative Marketing Contract upon which it is built.

We therefore ask this court to affirm the decision of the highest court of Kentucky and to uphold the legislation of that state designed to permit farmers to market their products co-operatively and to safeguard and protect co-operative contracts against malicious breach by outside, antagonistic interests.

Respectfully submitted,

AARON SAPIRO,
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R. W. BINGHAM,
Attorneys for Defendant in Error.

CHICAGO, ILLINOIS,
January 15, 1927.

APPENDIX A.

PORT OF SECRETARY OF AGRICULTURE OF THE UNITED STATES.

WASHINGTON, D. C.,
November 1, 1926.

THE PRESIDENT:

* * * * *

THE SURPLUS PROBLEM.

s to the surplus problem, there are two general ave- of approach to its solution. One is through a bet- adjustment of production to market requirements. cognize the difficulties of controlling production, but convinced nevertheless that through organized and directed efforts much more can be done than we hitherto done to eliminate the recurring surpluses prove so detrimental to the farming industry. Our mplishments in this direction since the war indicate ibilities for the future.

e other approach is through marketing. *It seems e that the central problem is one of merchandising.* er control of the movement of agricultural prod- into consumption channels is needed. *This means adequate marketing, storage, and credit facilities be available and that producers must be organized t together in their marketing operations. An or- flow of products to market, I believe, can best be ted by farmer-controlled agencies.* Legislative ac- should be designed to create and enlarge such agen- and supplement their efforts. No general formula cover all commodities and all regions. Every region every commodity has its special marketing problems. t is needed is concentrated and co-ordinated effort sd up by adequate resources. To do this may re- further enabling legislation.

I have frequently stated, the great need to-day is

to give the farmer greater bargaining power through centralized selling brought about by the consolidation of our existing co-operative associations along commodity lines. There are many advantages in co-operative effort, and I shall touch upon them more in detail in my discussion of the co-operative marketing movement. What we are concerned with here is the subject of agricultural legislation as it relates to marketing.

Many of our recent agricultural laws have been directed to the marketing of farm products. The United States warehouse act gives to the farmer a warehouse receipt for his stored products which is universally recognized as sound collateral for loans. Co-operative organizations are making constantly wider use of Federally licensed warehouses. The intermediate-credit banks established under the agricultural credits act of 1923 are extending credit to organized farmers, and this credit fits well into co-operative effort. These and other acts have made a real contribution to the marketing of farm products.

Funds Needed for Marketing.

If we are to give particular attention to centralized co-operative effort, even present credit facilities may not be sufficient. Co-operative associations are not able to obtain sufficient cash advances on their products to enable them to practice orderly marketing in a complete sense. At the best they can only obtain 65 or 75 per cent of the going market price of their products, and there are thousands of farmers who can not operate on this basis, for their current expenses demand more nearly the market price at the time the crops are harvested. For the same reason many of them can not join a co-operative association.

If additional funds were available to make advances to co-operative associations in addition to credit available from existing agencies, they could make liberal payment to members at the time the products were delivered and their power to regulate the movement of products into consumption channels would be greatly enhanced. It would be possible for them to carry surplus production from one season to another. The individual farmer would have the money for his products but would not lose control over them.

Action of this sort would tend to stabilize the prices of farm products. This is a very different thing from price manipulation. Studies made by the department show that over a relatively few years the production and market requirements of most farm products are in fair balance. This indicates that a program of orderly marketing, with resultant stabilized prices, is easily within the realm of possibilities. *Such a program would not menace the interests of consumers but would contribute materially toward the general stability of supply and markets.*

CONSUMERS' INTERESTS SAFEGUARDED.

It may be well to emphasize the fact that no hardship to the consuming public is caused by a program of stabilized prices. Periodic and seasonal depressions in the prices of farm products are not reflected in corresponding declines in prices to consumers, but they play havoc with the agricultural industry. A sound program of price stabilization would guarantee an even flow of products to the consumer at fair prices. It would thus be a benefit to both the producer and the consumer. *Agriculture does not lend itself to monopolies or to improper price manipulation.* Attempts have sometimes been made by agricultural organizations to exact prices out of line with basic supply and demand conditions. The result has invariably been unfortunate for the authors of the plan. Efforts at price stabilization in harmony with supply and demand conditions, on the other hand, are quite generally successful. **Organization of farmers in co-operative associations formed on a commodity basis seems to me the best way to stabilize prices.**

DEVELOPMENTS IN CO-OPERATIVE MARKETING.

This opens up the general subject of co-operative marketing. Gluts and wastes can not be overcome, nor can the spread between what the farmer receives and what the consumer pays be narrowed sufficiently until effective machinery has been set up to feed farm products into the markets of the country in an orderly manner and at a rate consistent with consumption requirements. This is a formidable undertaking. There is a natural division

of interests between different agricultural sections of t
country. Farmers of the East are heavy buyers of we
ern grain. The South is a heavy buyer of northern po
products, grains, and feedstuffs. The North is a buy
of cotton products. Even within the same region t
grain grower's finished product may be the livesto
feeder's raw material. *Our marketing policy should ha
regard for the interests of agriculture as a whole.*
plan of organization that will work fairly and effective
as between the cotton producers of the South and t
milk producers of the New England States, the co
growers and the hog raisers of the Corn Belt, the citr
growers of California, Florida, and Texas, the cattlem
of the range and beef-cattle States, the potato growe
of Maine, Idaho, Wisconsin, and Minnesota, and the pr
ducers of all the other crops grown in this country, c
not be improvised in a moment. **I believe, however, th
we are on the right track when we emphasize the co
modity principle in co-operative organization.**

Co-ordination of Units Needed.

It is obvious, of course, that co-operation will not
much for the wheat grower if 5,000 or 10,000 associ
tions try to operate in wheat independently of one a
other. There is needed a co-ordination of local co-oper
tive units and a central sales agency. Only by su
means can farmers expect to have any effective bargai
ing power in the wheat market. But a wheat co-oper
tive with a central sales agency that had in its posse
sion from 100,000,000 to 200,000,000 bushels of whe
might help materially in stabilizing wheat prices.

*The United States has become great industrial
largely through mass production, which facilitates elim
nation of waste and lowering of overhead costs.* Larg
scale organization in the business world has effected tr
mendous economies both in production and distributio
and has enabled manufacturers to supply consume
with what they want when they want it. *It seems to m
that in this matter agriculture must follow the examp
of industry. It must have a similar large-scale develop
ment of its business organization, managed by competen
executives.* There are 6,500,000 farmers, each represen
ing a unit of agricultural business. It is therefore no

easy to organize agriculture for effective business operations. But the start that has been made in that direction indicates that it can be done.

Natural limits to the extent to which co-operative marketing can be centralized are set by the fact that each basic agricultural product presents problems of its own. It is obviously impracticable to have wheat growers, cotton growers, fruit growers, and live stock raisers all in the same organization. *So far as I can see now, there ought to be separate organizations for each leading commodity.* But there ought not to be too many competing organizations each striving to handle the same product. When a crop is handled by several hundred small concerns, whether they are co-operative or private, there is bound to be confusion, price cutting when supplies are heavy, market gluts, and *other conditions that result in heavy losses for which the producer must pay.*

I have already mentioned the possibilities open to wheat growers through the federation of local co-operative organizations. It is necessary to have local farmer-owned elevators. Local co-operative units are necessary for assembling and shipping wheat. Local organizations, however, can not exercise any effective bargaining power unless they follow a limited marketing policy. Such action is, of course, impossible without an overhead selling agency representing them all.

Building Bargaining Power.

What we need, in short, is organization, both local and regional. *Our co-operative marketing agencies should be organized on the broadest scale compatible with effective dealing with the special problems presented by the different branches of agriculture.* As I have mentioned wheat several times in this connection for purposes of illustration, I may as well amplify my point by further reference to that commodity. There are about 4,000 farmers' elevators in the United States and no fewer than nine wheat pools. These elevators and pools, however, do not conduct any common policy. As a result they have probably little more bargaining power than have individual wheat growers. But if they were federated our wheat growers' organizations would be in a position to exercise a very considerable influence on

market conditions. It is not necessary for a co-oper
association to handle the whole of a crop in order to
some say as to its price. It is often enough to co
merely the surplus beyond what is required for cu
consumption.

Farmers can unquestionably exercise effective
gaining power through commodity organizations re
senting a majority of the heavy producers of the c
handled by the organizations. In that way they *can*
vent disastrous ups and downs in prices, cause a ste
flow of products to the best markets, and exert some
fluence on production. It is important that farmers'
ganizations should not confine their work merely to r
lating the flow of agricultural products to market. T
should seek to adjust production as well as marketin
consumption requirements. Effective agricultural co
eration begins at seeding and planting time, and in
case of many crops ends only when the product is tur
over to the processor or to the consumer. When fa
ers' business organizations take this broad view of t
functions they can make a real contribution to the sta
ity and progress of agriculture.

Required Degree of Organization.

What proportion of the producers must be organi
in co-operative associations to get the best results
keenly debated question. Enthusiasts will not be c
tent with anything less than 100 per cent organizat
As, however, this end is not likely to be reached fo
long time, if ever, we shall do well to bear in mind
demonstrated fact that co-operative marketing is not
pendent for its success on the inclusion of all farmer
its organizations. Co-operative organization is of
measurably effective even when very incomplete. *I*
true that a co-operative association controlling only p
of a given crop may sometimes confer more benefit
nonmembers than on members. It may enable nonm
bers to get better prices than would otherwise be obta
able, without saddling upon them any of the expense
risk involved in the operation of stabilizing the mar
However, that is a liability which the co-operative mo
ment in its earlier stages can hardly avoid. It will te
to diminish as the farmers become better informed ab

co-operation and join co-operative associations in larger numbers. Eventually, no doubt, a situation like that seen in the case of certain great industrial organizations will arise, wherein unorganized "independents" find themselves more or less obliged to fall in step with the general marketing policy laid down by the dominant organized group.

An Objection Answered.

It has been suggested that farmers who produce many crops will find it impossible to participate advantageously in co-operative marketing through organizations formed on commodity lines. The idea is that they can not be expected to join a sufficiently large number of different associations. This seems to me a very trivial objection to the method of organization which I am advocating. It would seldom be necessary for farmers to belong to more than two commodity organizations, since few farmers produce more than two different major crops. The average farmer can not expect to do the whole of his business through co-operative agencies, for the present at any rate. A wheat farmer in the Red River Valley of Minnesota, for example, would probably find his interests sufficiently protected by membership in a wheat co-operative. Conversely, a dairy farmer in the same State, with only a small wheat acreage, would probably be content with membership in a dairy co-operative. As a matter of fact, however, thousands of farmers already belong to more than one farmers' marketing organization without getting their affairs unduly complicated.

Co-operative associations reporting to the department at the end of 1925 had on their membership rolls a total of 2,700,000 producers. Allowing for duplication, owing to the fact that many farmers are members of two or more associations, and for inactive members, it is conservative to state that approximately 2,000,000 farmers are now engaged in co-operative marketing. The membership of co-operatives to-day is more than three times as great as in 1915, when it was approximately 651,000. The total business of co-operative associations in 1915 was $635,800,000. In 1925 it reached approximately the huge total of $2,400,000,000.

Possibilities of Co-operative Marketing.

A large-scale efficiently managed co-operative can e fect three fundamental improvements in the marketi of farm products: (1) *It can standardize grades a handling methods;* (2) *it can develop an effective me chandizing program;* (3) *it can give the farmer inform tion which will enable him to visualize market conditio six months or a year in advance, and thus assist in ma ing adjustments in his production plans.*

The development and use of grade standards has co about largely because of the demands of the co-operati associations. In pooling the products of their membe the co-operatives must have grades so that they c make returns to the growers in accordance with the ma ket value of the product each one produces. The co-o eratives have also found that the standard grades ma trading easier, reduce wastes, and promote wider distr bution and increased consumption.

The co-operative associations can do a better job merchandising farm products than the individual pr ducer. Merchandising means more than taking order The aim of the selling program of a co-operative shou be service to its members and its customers. A thorou study of the price and demand history of a commodit and a knowledge of the present and potential supply a essential before the correct selling program can be d termined for that commodity. The association mu know the supply of the product and of competing pro ucts. An association selling oranges must be informe regarding the apple crop, because apples come into co petition with oranges. If there is an unusually lar crop of Italian lemons, the California lemon grower must take that fact into account in their price and sal policy.

Furthermore, the association must know the marke and the factors that affect prices. When it has collecte all this information, the association must use it to guid its price policies; it must determine the markets in whic it will attempt to sell, the quantity it will offer each da or week, and the trade channels it will use. *Only a larg scale organization can do this job efficiently.*

An Example of Market Information.

As an example of information that may be used to guide the marketing policies of co-operatives, studies by the Bureau of Agricultural Economics of the relationship of wheat supply to prices may be cited. The world supply of wheat—especially the supply of the Northern Hemisphere—has a greater influence on price than the supply in the United States, whenever there is a surplus for export. Hard spring-wheat production is frequently sufficient only for domestic requirements, but there is usually a surplus of other classes. The relationship for a period of 25 years of the supply of wheat in the Northern Hemisphere (production plus carry-over) and the supply in the United States to price has been calculated. From these studies it is possible to determine the usual relationship between supply and price during these years and to use the information in estimating probable movements in the future.

Finally, the co-operative associations can furnish the producers information by which they can adjust their production in the light of market requirements. Co-operation must reach back to production, guide the organization of farm enterprises, and direct the production programs of the members. The problem of agriculture at the present time is largely one of co-ordinating production. To a large extent each of 6,500,000 farmers produces farm products without reference to the plans of his neighbors and without consideration of the factors which will be instrumental in determining whether he produces at a profit or loss.

Co-operation is already having an important effect upon production. Among the fruit growers, undesirable varieties are being eliminated and the quality of the fruit grown is being improved by better cultivation, fertilization, and spraying. The milk producers are delivering a product testing higher in butterfat and lower in bacterial count. Cotton growers, who are paid through their co-operative associations according to the grade and staple of their crop, are making fruitful attempts to plant only standard varieties and to avoid damage which lowers the grade of their cotton. * * *

The price which a co-operative obtains for its prod-

ucts is determined by the supply of the product and th
demand for it. Not only the supply in the possession
the association but that controlled by other shippers an
produced in other sections of the United States and
foreign countries influences prices. The supply and pric
of competing products are also factors. Wheat compete
with corn and rye as a bread grain; cotton with wool an
artificial silk; and potatoes with sweet potatoes an
other vegetable crops. The association which attempt
to manipulate prices by withholding its products fro
the market usually discovers that it has created a mor
favorable market situation for competing sections an
products and has possibly sacrificed the crops of its mem
bers. The disappointment resulting from the failure
a program that from the beginning was impossible has
some cases set the stage for failure.† * * *

Success Based on Service.

The associations with a record of accomplishment hav
been successful because of the superior service the
have been able to render their members and customer
and not because they have been able arbitrarily to fi
prices. As one definite example, the experience of a woo
growers' co-operative association, with headquarters a
Columbus, Ohio, may be cited. This association wa
formed in 1918, and in eight years (1918-1925) has mar
keted 25,139,000 pounds of wool produced by Ohio, Ind
ana, Michigan, and West Virginia growers. Its averag
net returns to its members have exceeded the averag
of local Ohio prices each year by amounts varying fro
2½ cents per pound in 1925 to 8 cents in 1921 and 192
and 9 cents in 1922. This represents increased return
to its members totaling over $1,500,000 for the eigh
years, without considering the effect the activities of th
association may have had on local prices and buyin
practices. The members in addition are the owners of
wool warehouse in Columbus which was purchased i
1920 for $125,000.

The success of this association has been due, first, t

† "The Secretary here speaks of arbitrary price fixing. It should no
be taken from the foregoing that determination of prices is alway
unwise or arbitrary. Intelligent and wise determination of prices is
proper service and one which may be performed to the advantage
the producer and the public." (Footnote ours.)

the education of its members with regard to wool grades, the care of the flock, and the preparation of the clip; second, to the practice of selling direct to the mills. It markets wool throughout the year and supplies each mill the grade of wool that will meet its needs, prepared in such a way that it can be handled with a minimum of waste. *These are services to its customers which enable the association to obtain a premium for a large part of its wool.*

In the marketing of fluid milk a California co-operative association has made progress, which is typical of a number of successful fluid-milk organizations. This association was formed in 1915, and operated as a price bargaining association until 1920. In that year it acquired 60 per cent of the stock of a retail milk-distributing company at Los Angeles, and now is sole owner of this company.

Milk Handled Through Subsidiary.

At the present time 41 per cent of the milk produced by members of the association is distributed to the consumers through this subsidiary company. From 26 milk routes in 1920, the business had grown to approximately 300 milk routes at the beginning of 1926. The remainder of the milk delivered by members of the association is sold to other distributors, and during periods of surplus a portion is manufactured into by-products. *Improvement of the product and the co-ordination of marketing machinery have stabilized returns to the producers.* In 1925, milk to the value of $5,570,032 was handled by the association at a cost of 1.2 per cent.

A co-operative association marketing cotton has found that its chief possibilities lie in giving its customers—the manufacturers—superior service. The spinner wishes to purchase cotton in "even-running lots"—that is, all of the same grade and character. He wants cotton which meets his special needs. The officials of the association quickly recognized that they must first ascertain the needs of their customers, then develop standard "types" which meet these needs, and deliver the exact grade and staple length which the customer desired—not once, nor occasionally, but continuously. This appears to be a simple problem, but it is really very difficult for any

agency but a co-operative association to meet it satisfactorily. The association can give its customers "even-running lots" because it has some 200,000 bales from which to select the exact cotton each buyer requires. By its system of classification and records it knows the grade, staple length, and weight of each bale, the warehouse where it is stored, and the grower who produced it. The dealer who sells 100 bales to a manufacturer with the expectation of buying this cotton—1 bale or 10 bales at a time, as it becomes necessary to make deliveries—can not guarantee the uniformity of his shipments with the same assurance as the co-operative association which *knows* it has that exact type of cotton on hand.

New Co-operative Law.

The legislation enacted by Congress has been wisely planned to free the co-operatives from undue restrictions and to assist them in meeting their problems. The Capper-Volstead Act, which became a law in 1922, recognized the right of producers to organize co-operatively, and removed the threat of prosecution under Federal anti-trust statutes of co-operatives conducting a legitimate business.

The past year has been signalized by the passage of the act to create a division of co-operative marketing in the Bureau of Agricultural Economics. This bill was drafted after conference with co-operative leaders representing all commodities and all sections of the country. It is designed to enable the department to conduct research studies and furnish service which will aid in the development of the co-operative movement. Research designed to test existing business and marketing methods, education in the principles and practices of co-operation, and such service to the co-operatives as can be rendered by a fact-finding agency are the objectives of the new division.

Research in the business and marketing methods of co-operation, such as the department is undertaking, is not a theoretical abstraction but can be made of practical help and guidance to the associations. The need of the co-operatives for the assistance research can furnish is probably greater than that of private business. Each

advance made by co-operative associations calls for a careful study of the conditions under which they must operate. They require a type of research that not only deals with established methods and practices but looks forward to changes which the development of co-operation will introduce.

Commodity Studies Begun.

The division of co-operative marketing is studying at the present time the co-operative marketing of cotton, grain, live stock, fluid milk, and fruits and vegetables. A study just completed of the costs and operating practices of cotton gins may be cited as an example of the work that is being carried on. This study was undertaken in anticipation of the interest which exists among the members and officials of cotton-marketing associations in the formation of local co-operative gins. They will have, as a result of this study, definite information to guide them in forming their ginning associations, and an understanding of the possibilities and problems of this form of organization.

A project dealing with the organization, operating, financial, and selling problems of individual co-operatives was inaugurated early in 1925. This work will be expanded under the provisions of the co-operative marketing act. The demand for studies of this kind indicates the interest among co-operative associations in a close analysis of their business and merchandising operations and in the external factors which affect the prices received for their products. The object in conducting analyses of the business of individual associations is primarily to accumulate a sufficient number of cases to set up operating ratios and standards for co-operatives, and to study by a case system the economics of co-operative marketing. It is essentially a research project, although the development of methods that will enable the co-operative associations to study their own problems is an immediate service.

Employment of Specialists.

The act makes possible also the employment of specialists who are versed in co-operative marketing and familiar with the problems of particular commodities. These men will have two functions; first, to collect statistical and other information made available by the Department of Agriculture and other agencies, and disseminate it to the co-operatives in such form as will be most useful; second, to outline and to assist in marketing research and service required by the co-operative associations. These men will have a helpful personal relationship with co-operative organizations, and to a certain extent will be a connecting link between the associations and the men and agencies engaged in research work.

The department expects to co-operate with and assist schools for instruction in co-operation which are being conducted by agricultural colleges and co-operative associations. The growing interest in this instruction is indicated by the increased attendance of members, directors, officers, and employees of co-operatives who spend a week or more at these schools learning the general facts regarding co-operation and the details of financing, accounting, and merchandising methods. The department can make an important contribution by assisting in the development of programs for these schools and by bringing a national viewpoint to those who are considering State and local problems. The dissemination of knowledge regarding the principles and aims of co-operation is one of the major problems of the movement. It is the foundation of sound co-operation.

The department, under the co-operative marketing act, intends to render services which will promote and foster co-operation. The act does not give the department regulatory control over the co-operative associations in any degree. It has never been the policy of the department to attempt to seek such control. Neither does the department intend to undertake any of the functions which the co-operatives themselves were organized to perform. The work of the department will be confined to those research, educational, and service activities which it is peculiarly fitted to perform, and it will be guided in this work by the developing needs of the co-operative organizations. * * *

There is a close relationship between the intermediate credit banks and the co-operative movement. More than half the loans of the banks have been made to farmers' co-operative marketing associations. Moreover, the fact that the co-operatives can tap the resources of the intermediate credit banks has a tendency to make it easier for them to get credit from commercial institutions. That has been demonstrated over and over again. Co-operative associations can get money more easily and on better terms from commercial banks now that they have the intermediate credit banks to fall back on in case of need. The intermediate banks loaned nearly $125,000,000 to co-operative marketing associations last year to finance production as well as marketing. Many co-operative associations have organized credit corporations which can rediscount the paper of their members at the intermediate credit banks. *In this way the resources of the banks are made available to thousands of producers who might otherwise have to borrow for production purposes on very unfavorable terms.* * * * (Italics ours.)

(Signed) W. M. JARDINE
Secretary of Agriculture.

(Above excerpts from pages 5 to 17, inc., of Annual Report of Secretary of Agriculture for year 1926.)

APPENDIX B.

OPINION.

LIBERTY WAREHOUSE CO. V. BURLEY TOBACCO GROWERS CO-OP. ASS'N.

(271 S. W. 695)

(Court of Appeals of Kentucky. May 1, 1925.)

Appeal from Circuit Court, Mason County.

Action by the Burley Tobacco Growers' Co-operative Association against the Liberty Warehouse Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Allen D. Cole and J. M. Collins, both of Maysville, for appellant.

Robert H. Hays, of Lexington, Browning & Reed, of Ashland, and Aaron Sapiro, of San Francisco, Cal., for appellee.

THOMAS, *J.* The appellee and plaintiff below, Burley Tobacco Growers' Co-operative Association, was organized pursuant to the provisions and terms of a statute enacted January 10, 1922, commonly known as the Bingham Co-operative Marketing Act. The statute is now sections 883f1 to 883f41, both inclusive, in the 1924 Supplement to Carroll's Kentucky Statutes. Plaintiff brought this action in the Mason circuit court against appellant and defendant, Liberty Warehouse Company, to recover the penalty of $500 prescribed by section 27 of the act and now section 883f27 of the Supplement to the Statutes. In the petition it was charged as a ground for the recovery that defendant was a corporation and conducting a tobacco warehouse in this commonwealth, and that it had violated the provisions of the section by knowingly aiding, assisting, and inducing a member of the association to violate his contract after it had been

notified of the facts and before it sold the tobacco of the member on its loose leaf floor. The petition also prayed for the recovery of a reasonable attorney's fee against defendant and which is also provided for in the same section. We will not consume time in giving a detailed statement of the averments of the petition, but will content ourselves with saying that it contained all necessary averments to authorize the recovery prayed for, if the act, and particularly its section 27, does not contravene any provision of either the federal or our Constitutions. The demurrer filed to the petition was overruled, followed by an answer in several paragraphs wherein the entire act was attacked as violative of the Fourteenth Amendment of the federal Constitution, since it is claimed that it contravenes practically all the guaranties contained in that amendment. It was also alleged that the statute as an entirety was invalid because it attempted to regulae and affect interstate commerce, which was exclusively within the jurisdiction of the federal government and its regulation forbidden by the Legislature of a state.

Focusing the defense on the particular section creating the cause of action in favor of plaintiff (27 of the act), defendant alleged: (a) That it was invalid because it prescribed a penal action in favor of plaintiff without the creation of a public offense, and it was therefore special legislation in violation of subsections 4 and 29 of section 59 of our Constitution; (b) that it violated subsections 1 and 29 of the same section of our Constitution, in that it prescribed a special cause of action unknown to the common law in favor of plaintiff only, and it is therefore special legislation, in violation of those subsections, and also that it violates the same subsections by trenching upon the judicial authority in regulating trials before the jury by a special act; (c) that it violates the Fourteenth Amendment to the federal Constitution by giving the action therein claimed to only cooperative associations, to which plaintiff belongs, for the violations contained in the section; (d) that it conflicts with section 54 of the Constitution by limiting and fixing the amount to be recovered by plaintiff for an injury to its property, *i. e.* its contract with its member; (e) that it violates the Fourteenth Amendment to the federal Constitution because it takes from the jury the right to

determine the amount of penalty that should be recovered for the damages to plaintiff's property based upon the facts contained in the section; (f) that it violates subsection 29 of section 59 of our Constitution by giving, in connection with section 18 of the Bingham Act, a double remedy for plaintiff's breach of contract with its member; (h) that it violates the same subsection of the same section of our Constitution as well as the Fourteenth Amendment of the federal Constitution, by denying to appellant the equal protection of the laws, since there is no provision for defendant to recover an attorney's fee against plaintiff if the latter's action to recover the penalty shoud be dismissed, and it is therefore discriminatory in favor of plaintiff. In a separate paragraph defendant alleged that plaintiff had interfered with and injured its business not only by organizing and thereby taking from defendant tobacco that it otherwise would have obtained, but also by the bringing of this action, and all in an endeavor to assert its rights contrary to the federal statute against pools, monopolies, and combinations commonly known as the Sherman Anti-Trust Act (U. S. Comp. St. § 8820, *et seq.*), and defendant had been injured and damaged thereby in the sum of $20,000, and it sought the recovery of treble damages ($60,000) allowed by that act. Demurrers and motions testing the sufficiency of the answer as a whole, including the counterclaim, were filed and made by plaintiff and sustained, and, defendant declining to plead further, judgment was rendered against it for the penal sum of $500 as provided in section 27 of the Bingham Act and for $100 attorney's fee, and from that judgment it prosecutes this appeal.

The constitutional ailments of the statute asserted and relied on by the defense are so numerous that we may have overlooked some of them, but we will attempt, in a brief way, by what we shall say in this opinion, to point out that none of them are available as a defense to this action.

Practically all, if not all, of the objections here urged were disposed of by us, contrary to defendant's contention, in the very recent case of *Potter* v. *Dark Tobacco Growers' Co-operative Ass'n*, 201 Ky. 441, 257 S. W. 33, wherein, with considerable detail and much elaboration, we held that the enactment by our Legislature of the Bingham Co-operative Marketing Act did not violate

the Fourteenth Amendment to the federal Constitution, nor any of the provisions of section 59 of our Constitution as being special or discriminatory legislation, since the subject-matter dealt with by the act was permissible classification within the provisions and terms of both the federal and state constitutional provisions. But it was said in that opinion:

> "There is, however, neither allegation nor proof that a monopoly actually has been created, or that trade has been restrained by appellee, hence it is clear the contract cannot be annulled as violative of the anti-trust provisions of either the Sherman Act or the common law now in force in this state."

And about the only reference by counsel to the Potter opinion is to the insertion of that excerpt in it which it is claimed removes it as an authority in this case, since it is insisted that in this action those matters are expressly averred and admitted by the demurrer. But we do not interpret the Potter opinion as being wholly based upon the absence of such facts. The above excerpt was inserted therein only as a strengthening reason for the conclusions finally reached by the court, and it was never intended, nor is the opinion susceptible to any such interpretation, that it would have been otherwise if those matters had been expressly averred. Both in that case and in this one the validity of the act as well as all of its sections was and is to be tested by the power and authority conferred upon plaintiff by the terms of the act itself, since it was not claimed in that case, nor in this one, that plaintiff was doing or intended to do anything beyond the power conferred upon it by the statute. In other words, neither in the Potter Case nor in this one was the constitutionality of the act or any of its sections contested because of an unconstitutional administration of its provisions, but only because the provisions themselves were unconstitutional. It is therefore patent that the Potter opinion, if we are to adhere to it, is not in the least destroyed as an authority herein because of the reason urged by defendant.

We will not repeat the discussion of the constitutional objections to the Bingham Act that were relied on in the Potter opinion, nor restate our reasoning therein contained through and by which we upheld it, and will decline to sustain any of the objections therein urged

against its constitutionality, since on reconsideration w
entertain the same opinion as to its validity.

[1, 2] We may add to what was said in that opinio
that there is no statute at present in this state, nor wa
there any when the cause of action herein arose, agains
pools, trusts, and monopolies, and by the Clayton Amend
ment to the Sherman Anti-Trust Act (38 Stat. 730) agr
cultural products were expressly excluded from that act
which left, as the only law against such combination
the common law, provided it prevailed in this state as t
agricultural products after the enactment of the Bingha
Act. It is, however, conceded that it is competent for
Legislature to repeal the common law prevailing in th
jurisdiction where it sits, the same as it may repeal
prior statutory enactment, and section 28 of the Bingha
Act expressly provides that the organization of the co
operative marketing companies provided for by it shal
not be deemed "to be a conspiracy nor a combination i
restraint of trade nor an illegal monopoly; nor an at
tempt to lessen competition or to fix prices arbitrarily
or to create a combination or pool in violation of any law
of this state." It is then provided in the same sectio
that—

> "The marketing contracts and agreements betwee
> the association and its members and any agreement
> authorized in this act shall be considered not to b
> illegal nor in restraint of trade," etc.

It would therefore seem that section 28 of the act ex
pressly repealed any rule of the common law that migh
prevail in this state militating against the legality o
such contracts. However, if it should be contended tha
such a provision was itself unconstitutional, it could only
be so held upon the ground that it was an unwarrante
classification which the Potter opinion, and many other
we might cite, held was untrue.

[3, 4] But back of all that, we think it would not be
amiss to say that neither the police power of a Legis
lature nor the common law is unalterable and forever
fixed, regardless of changes in prevailing conditions.
Each of them were intended to improve human condi
tions and to provide a method for the betterment of so
ciety under present prevailing and developed conditions.
As they change, it is competent to change the common

law, or to enlarge, modify, or qualify the police power to fit the changed conditions. We take judicial knowledge of the history of the country and of current events, and from that source we know that conditions at the time of the enactment of the Bingham Act were such that the agricultural producer was at the mercy of speculators and others who fixed the price of the selling producer and the purchasing price of the final consumer through combinations and other arrangements, whether valid or invalid, and that by reason thereof the former obtained a grossly inadequate price for his products. So much so was that the case that the intermediate handlers between the producer and the final consumer injuriously operated upon both classes and fattened and flourished at their expense. It was and is also a well-known fact that without the agricultural producer, society could not exist, and the oppression brought about in the manner indicated was driving him from his farm, thereby creating a condition fully justifying an exception in his case from any provision of the common law, and likewise justifying legislative action in the exercise of its police power.

Supplementing everything heretofore said, it may be also stated that co-operative marketing acts for agricultural products have been enacted in a great number of the agricultural states, the provisions of which are similar to and in many instances the same as are the provisions of the Bingham Act. They are all intended to accomplish the same ultimate end, and in each of those states they have been upheld in actions urging the same constitutional objections as are made here. To insert those cases would fill more than a page of this opinion, and we will refrain from doing so, since they may be found in any well-equipped law library. They all proceed upon the ideas herein expressed and those contained in the Potter opinion.

[5] What has been said disposes of all the objections to the act as a whole, as well as its section 27, that are based upon the ground of improper classification and thereby making its provisions special legislation and discriminatory in favor of plaintiff, contrary to the inhibitions of section 59 of our Constitution and its various subsections, since under that section it is competent for the Legislature to classify subjects within proper limits,

and after its enactment a statute applicable to the class fied subject applies to all cases coming within that class fication. It is not special but general legislation, an therefore is not offensive to the section. We have s held in a great number of cases since the adoption o our present Constitution,, and the principle is familia to and conceded by the legal profession throughout th state.

[6] What we have already said disposes of pra tically all of the objections from (a) to (h) enumerate above, with the exception of some to which we will no direct our attention. The first one is that it truthful may be said that the imposition of the $500 penalty section 27 of the Bingham Act does not give to plainti an additional cause of action for the violation of th pooler's contract. The member who violates his co tract is not penalized to any extent by any of the term of that section. They only apply to the denounced co duct of a warehouseman (a third party) in procurin aiding, or abetting the member who violates his co tract. If the contract is one in furtherance of a legisl tively declared purpose, then it was no doubt competen for the Legislature to throw such restraints around it was reasonably necessary to protect its integrity, an we do not think the imposition of the penalty, plus a torney's fees as a part of it, is in excess of the powe or authority of the Legislature in exercising its rights preserve the integrity of the contract. Indeed, simil statutes to accomplish the same purpose by establis ing a deterrent against others procuring a violation acquired rights, and not to augment plaintiff's damag for their breach, have been upheld in many courts of th country; some of the cases being *Atchison, Topeka, et Ry. Co.* v. *Matthews*, 174 U. S. 96, 19 S. Ct. 609, 43 L. E 989; *Chicago, etc., Ry. Co.* v. *Fentuch*, 191 F. 482, 1 C. C. A. 126; *Cleveland, etc., Ry. Co.* v. *Hamilton*, 200 I 633, 66 N. E. 389; *Fidelity Mutual Life Association* *Mettler*, 185 U. S. 308, 325, 22 S. Ct. 662, 46 L. Ed. 92 and many others which could be cited. Section 1814 our present Statute (1922), which has been the law f perhaps more than a century, provides that one keepi and operating a ferry shall forfeit, as a penalty, $25 f the first overcharge of prescribed ferry rates and $1 for each subsequent one, and such penalty may be r

covered in a proceeding in the name of the one who paid the overcharge and for his use and benefit. Indeed, it is nothing uncommon to provide for such penalties, and that they may be recovered for the benefit of the one against whom the violation was directed instead of by the commonwealth in a prosecution by information or indictment and since warehouses are proper subjects of classification (*Nash* v. *Page*, 80 Ky. 539, 44 Am. Rep. 490; *Pannell* v. *Louisville Warehouse Co.*, 113 Ky. 630, 68 S. W. 662, 82 S. W. 1141, 231 Ky. Law Rep. 2423; *Jewell Tobacco Warehouse Co.* v. *Kemper* [Ky.] 268 S. W. 324, decided January 20, 1926; the Potter Case, *supra;* and many other cases from this and other courts) there can be no constitutional objection to penalizing them when they induce a member of the association to violate his contract in the manner set out in section 27 of the act, and the penalty is not to compensate plaintiff for damage, but to punish defendant for doing the act prohibited by the statute. There is, therefore, no double remedy given to plaintiff for the violation of the contracts of its members.

[7] Neither is objection (e), above, applicable to the facts in this case, since it is competent for the Legislature to fix the amount of the penalty in such cases provided it is not unreasonable in amount.

[8] Likewise, objection (h) is of no avail, since defendant is not liable for the penalty or the attorney's fee unless it is guilty of a violation of the act. If the act attempted to penalize both parties for a violation of its terms, it would then, perhaps, be required that they should be equally penalized, and such was true in the case relied on by defendant of *Atchison, etc., Ry. Co.* v. *Vosburg*, 238 U. S. 59, 35 S. Ct. 675, 59 L. Ed. 1199, L. R. A. 1915E, 953, and others cited by counsel supporting the same proposition. We have no such case here. The section attacked in this case (27) does not provide for the preservation and integrity of any contractual relations entered into by the warehouseman (defendant) and plaintiff. The penalty imposed upon the warehouseman is directed solely against it to prevent it from destroying contractual relations existing between plaintiff and its members, and the principles announced in the cases relied on by defendant's counsel are wholly inapplicable.

[9, 10] Objection (d) to the constitutionality of the act as offensive to section 54 of the Constitution is clearly untenable, since there is nothing in the attacked provisions of section 27 attempting to limit the amount of plaintiff's recovery for any injury to its property. But if otherwise, defendant may not rely on that objection, because it would affect only the rights of plaintiff and not any of those of defendant. *Burley Tobacco Society* v. *Brumback*, 128 Ky. 137, 107 S. W. 710, 32 Ky. Law Rep. 916.

[11] Neither do we attach any importance to the interstate commerce feature attempted to be injected into the case by counsel for defendant. In the first place, it is not shown that the tobacco of the member whose contract defendant is charged with assisting to violate ever moved in interstate commerce; *i. e.*, whether he produced it in another state and moved it to defendant's warehouse, or whether it was produced in this state and so moved. Again, it is extremely doubtful if it continued in interstate commerce after it had been removed from another state (if that was the fact) to defendant's warehouse. Section 27 of the act does not attempt to penalize any of the steps necessary for such removal, and when the tobacco was deposited in defendant's warehouse the latter would not be liable to the penalties of the act, unless it did something subsequent thereto to complete the violation of the member's contract with the association. Whatever, therefore, was thereafter done, would be in relation to a localized commodity and would appear to not involve the question of interstate commerce. But beyond all that, we have seen that the Clayton amendment to the Sherman Anti-Trust law excludes such products from the provisions of the latter act, and thereby Congress relinquished its superior right to regulate interstate commerce with reference to them and restored the right of the states to do so as long as that condition existed. It is therefore clear that the case is not one in violation of the Sherman Anti-Trust Act for which defendant could maintain its counterclaim, either for the actual amount of its alleged damages, or for treble that amount as attempted to be conferred by that act.

Finding nothing militating against plaintiff's right to maintain its cause of action herein, and nothing urged in legal defense thereof, it results that the judgment was proper, and it is affirmed.

APPENDIX C.

BURLEY TOBACCO GROWERS' CO-OPERATIVE ASSOCIATION MARKETING AGREEMENT.

MEMBER'S AGREEMENT WITH THE ASSOCIATION.

The Burley Tobacco Growers' Co-operative Association, a nonprofit Association, hereinafter called the Association, first party, and the undersigned Grower, second party, agree:

THIS IS FOR CO-OPERATIVE MARKETING.

1. The grower is a member of the Association and is helping to carry out the express aims of the Association for co-operative marketing, for minimizing speculation and waste and stabilizing tobacco markets in the interest of the grower and the public, through this and similar obligations undertaken by other growers.

GROWER SELLS TOBACCO TO ASSOCIATION FOR FIVE YEARS.

2. The Association agrees to buy and the grower agrees to sell and deliver to the Association all of the tobacco produced by or for him or acquired by him as landlord or lessor, during the years 1922, 1923, 1924, 1925 and 1926.

IF YOU HAVE A CROP MORTGAGE THAT TOBACCO DOES NOT HAVE TO GO TO THE ASSOCIATION IF YOU CAN'T CONTROL IT.

3. The grower expressly warrants that he has not heretofore contracted to sell, market or deliver any of his said tobacco to any person, firm, or corporation, except as noted at the end of this agreement. Any tobacco covered by such existing contracts or crop mortgage shall be excluded from the terms hereof for the period and to the extent noted, if the lien-holder insists upon the exercise of any right of possession or sale.

321

THE ASSOCIATION TELLS YOU WHERE TO DELIVER.

4. (a) All tobacco shall be delivered at the earli reasonable time after cutting or curing, to the order the Association, at the warehouse or plant controlled specified by the Association; or at the nearest warehou if the Association controls or specifies no warehouse plant in that immediate district; or by shipment, as rected, to the Association; and by delivery to the As ciation of the indorsed warehouse or other receipts bills of lading, properly directed.

POOR TOBACCO IS PENALIZED.

(b) Any deduction or allowance or loss that the As ciation may make or suffer on account of inferior gra quality or condition at delivery shall be charged agai the grower individually.

ASSOCIATION WILL TRY TO STANDARDIZE METHODS.

(c) The Association shall make rules and regulatio and provide inspectors or graders to standardize a grade the quality and method and manner of handlin curing and shipping such tobacco and the grower agre to observe any such rules and regulations and to ado the grading established by the State and Federal autho ties and the Association.

ALL TOBACCO WILL BE POOLED FOR EACH YEAR BY TYPE AND GRADE.

5. The Association shall pool or mingle the tobacco the Grower with tobacco of a like type, grade and qua ity delivered in the same crop year by other grower The Association shall classify the tobacco and its class fication shall be conclusive.

The tobacco delivered in any crop year to any poo at the order of the Association shall be handled in o major pool; and the minor pools shall be by type a grade.

ASSOCIATION WILL RESELL ALL TOBACCO AND PAY NET PROCEEDS TO GROWER—COSTS OF OPERATION AND OVERHEAD WILL BE DEDUCTED, BUT THE ASSOCIATION FORBIDDEN TO MAKE ANY PROFIT FOR ITSELF.

6. The Association agrees to resell such tobacco, together with tobacco of like type, grade and quality delivered by other growers under similar contracts, at the best prices obtainable by it under market conditions, and to pay over the net amount received therefrom (less freight, insurance and interest), as payment in full to the grower and growers named in contracts similar hereto, according to the tobacco delivered by each of them, after deducting therefrom, within the discretion of the Association, the costs of maintaining the Association and of handling, grading and marketing such tobacco; and of creating funds for credits and other general commercial purposes (said funds not to exceed 1 per cent of the gross resale price). The annual surplus from such deductions must be prorated among the growers delivering tobacco in that year on the basis of deliveries.

EVERY GROWER GETS THE SAME AMOUNT FOR THE SAME TYPE, QUALITY AND QUANTITY OF TOBACCO.

7. The grower agrees that the Association may handle, in its discretion, some of the tobacco in one way and some in another; may sell some upon delivery; may cure or process or manufacture all or any portion thereof, but the net proceeds of all tobacco or tobacco products of like type, quality, and grade, less charges, costs and advances, shall be divided ratably among the growers in proportion to their deliveries to each pool, payments to be made from time to time until all the accounts of each pool are settled.

The Association may contract with the owners of redrying plants to redry and store the tobacco delivered by the members of the Association.

THE TOBACCO WILL BE SOLD ANYWHERE—FOR EXPORT OR OTHERWISE—WHERE IT WILL BE MOST PROFITABLE.

8. The Association may sell the said tobacco, within or without the United States, directly to manufacturers

or exporters or otherwise, at such time and in such form and upon such conditions and terms as it may deem profitable, fair and advantageous to the growers; and it may sell all or any part of the tobacco with or through any other agency hereafter established, for the co-operative marketing of the tobacco of growers in other States throughout the United States, under such conditions as will serve the joint interest of the growers and the public; and any proportionate expenses connected therewith shall be deemed marketing costs under paragraph six.

THE ASSOCIATION CAN RAISE MONEY TO MAKE FIRST PAYMENT TO GROWERS.

9. The grower agrees that the Association shall borrow money in its name on the tobacco, through drafts, acceptances, notes or otherwise, or on any warehouse receipts or bills of lading or upon any accounts for the sale of tobacco or on any commercial paper delivered therefor. The Association shall prorate the money so received among the growers equitably, as it may determine, for each district and period of delivery.

The Association agrees to accept drafts drawn against it by the grower for any amount specified and determined by it, upon delivery of tobacco hereunder, and to assist the grower to discount such drafts, secured by the warehouse receipts, through the most advantageous banking system.

OFFICES OR PLANTS WHEREVER THEY ARE NEEDED.

10. The Association may establish selling offices, warehouses, plants, marketing, statistical or other agencies in any place.

YOU CAN STOP GROWING TOBACCO IF YOU WISH.

11. The grower shall have the right to stop growing tobacco and to grow anything else at any time at his free discretion; but if he produces any tobacco, or acquires or owns any interest in any tobacco, as landlord or lessor, during the term hereof, it shall all be included under the terms of this agreement and must be sold only to the Association.

YOU DO NOT HAVE TO DELIVER ANY PARTICULAR AMOUNT.

12. Nothing in this agreement shall be interpreted as compelling the grower to deliver any specified quantity of tobacco each year; but he shall deliver all the tobacco produced by or for him.

YOU DELIVER ALL THE TOBACCO YOU RAISE.

13. (a) This agreement shall be binding upon the grower as long as he produces tobacco directly or indirectly, or has the legal right to exercise control of any commercial tobacco or any interest therein as a producer or landlord during the term of this contract.

(b) If this agreement is signed by the members of a co-partnership, it shall apply to them and each of them individually in the event of the dissolution or termination of the said co-partnership.

YOU MAY MAKE A CROP MORTGAGE—THE ASSOCIATION WILL TRY TO HELP YOU SECURE STANDARD TERMS.

(c) If the grower places a crop mortgage upon any of his crops during the term hereof, the Association shall have the right to take delivery of his tobacco and to pay off all or part of the crop mortgage for the account of the grower and to charge the same against him individually.

The grower may place a crop mortgage upon his tobacco; and shall notify the Association prior to making any such mortgage. The Association will assist and advise the grower in any such transaction as far as it deems proper.

STATISTICS ARE NEEDED.

14. From time to time the grower agrees to mail to the Association any statistical data requested, on the forms provided for that purpose by the Association.

ALL CONTRACTS ARE ALIKE.

15. This agreement is one of a series generally similar in terms comprising with all such agreements, signed by individual growers or otherwise, one single contract

between the Association and the said grower annually and individually obligated under all of the terms thereof. The Association shall be deemed to be acting in its own name for all such growers in any action or legal proceedings on or arising out of this contract.

THE GROWER AUTHORIZES THE ASSOCIATION TO PROVIDE CURING OR RE-DRYING PLANTS IF IT NEEDS THEM.

16. (a) The grower hereby expressly authorizes the Association to deliver to any warehousing or other corporation organized for co-operation with this Association any or all of his tobacco for handling, processing, or manufacturing, or storing; and to charge against his tobacco and his prorated share of the funds necessary to create a reserve, equivalent to one class of its preferred stock annually plus bonus, to retire the said class; and to pay the dividends on all outstanding stock thereof.

(b) The grower shall be charged for such deductions only on account of warehouses or plants within his district or within his benefit, as determined conclusively by the Association; and for such deductions the grower shall receive a proportionate interest in such corporation.

ANY OLD CROP TOBACCO MAY BE DELIVERED TO THE ASSOCIATION TO SELL.

17. If the grower has on hand, upon execution of this agreement, tobacco free from liens and capable of delivery, he shall deliver such tobacco to the Association, as it may direct, to be graded by the Association and marketed by it, in pools wholly separate from all other deliveries hereunder, but generally in the manner here set forth.

DO NOT BREAK THE CONTRACT—THIS IS EXPENSIVE.

18. (a) Inasmuch as the remedy at law would be inadequate; and inasmuch as it is now and ever will be impracticable and extremely difficult to determine the actual damage resulting to the Association should the grower fail so to sell and deliver all of his tobacco, the grower hereby agrees to pay to the Association for all tobacco delivered, consigned or marketed or withheld by or for

him, other than in accordance with the terms hereof, the sum of five cents per pound as liquidated damages, averaged for all types and grades of tobacco, for the breach of this contract; all parties agreeing that this contract is one of a series dependent for its true value upon the adherence of each and all of the growers to each and all of the said contracts.

YOU WILL GET HIS TOBACCO ANYWAY.

(b) The grower agrees that in the event of a breach or threatened breach by him of any provision regarding delivery of tobacco, the Association shall be entitled to an injunction to prevent breach or further breach thereof and to a decree for specific performance hereof; and the parties agree that this is a contract for the purchase and sale of personal property under special circumstances and conditions, and that the buyer cannot go to the open markets and buy tobacco and replace any which the grower may fail to deliver.

VIOLATORS PAY THE COST OF FIGHTING THEM.

(c) If the Association brings any action whatsoever by reason of a breach or threatened breach hereof, the grower agrees to pay to the Association all costs of court, costs for bond and otherwise, expenses of travel and all expenses arising out of or caused by the litigation and any reasonable attorney's fee expended or incurred by it in such proceedings; and all such costs and expenses shall be included in the judgment and shall be entitled to the benefit of any lien securing any judgment hereunder.

THE CONTRACT IS COMPLETE ON ITS FACE.

19. The parties agree that there are no oral or other conditions, promises, covenants, representations or inducements in addition to or at variance with any of the terms hereof; and that this agreement represents the voluntary and clear understanding of both parties fully and completely.

NATIONAL CENTRAL AGENCY.

20. The Association is expressly authorized to exe
cise any or all of the grading, inspecting, marketing
other powers or rights granted hereunder through a
central agency to be organized for co-ordinating the a
tivities of this and similar co-operative marketing ass
ciations in other States. The Association shall, if po
sible, enter into any contract for such purpose and ma
agree to pool the products delivered hereunder wi
products of similar variety, grade and quality delivere
to generally similar associations under marketing agre
ments substantially the same in effect as this agreemen
and to unite with any such associations in the joint pu
chase, construction, lease or use of facilities and to a
sume obligations therefor.

Any costs of maintaining such central agency shall
prorated among the said Associations on the basis of t
gross sale proceeds from the products delivered by the
respectively and shall be considered part of the costs a
deductions provided for in paragraph six.

The Association agrees to assist in forming such ce
tral agency as soon as any similar Association is o
ganized in the United States.

Read, considered, and signed at
this day of , 1923.

(Do not sign without reading.)

Grower

P. O. Address

County State

1921 production acres; my part as landlor
( ) tenant ( ) is

1922 production acres; my part as landlor
( ) tenant ( ) is

Witness sign here

APPENDIX D.

ARTICLES OF INCORPORATION OF BURLEY TOBACCO GROWERS CO-OPERATIVE ASSOCIATION.

We, the undersigned, a majority of whom are residents and citizens of the State of Kentucky, engaged in the production of agricultural products, do hereby voluntarily associate ourselves together for the purpose of forming a co-operative marketing association, without capital stock, under the provisions of the Co-operative Marketing Act of the State of Kentucky.

1. The name of this Association shall be BURLEY TOBACCO GROWERS CO-OPERATIVE ASSOCIATION.

2. The purposes for which this Association is formed are:

a. To promote, foster and encourage the business of marketing tobacco co-operatively; to minimize speculation and waste in the production and marketing of tobacco and tobacco products; to stabilize tobacco markets; to handle co-operatively and collectively the problems of tobacco growers;

b. To engage in any activity in connection with the grading, handling, processing, drying, storing, shipping, warehousing, manufacturing and marketing of tobacco or tobacco products of the Association and of its members; and in the financing of any of said operations;

c. To purchase and sell any tobacco or tobacco products of its members; and to purchase and to sell to its members machinery, equipment or supplies used in any of the above mentioned activites, either by the Association or by the members thereof;

d. To borrow money and to make advances to the members of the Association; and to incur indebtedness without limitation;

e. To lend money to the members of the Association, in connection with any of the said activities, upon any

adequate security; and to accept as collateral for any such loans, warehouse receipts, mortgages, or any other kind of property or security permitted by law;

f. To sell, issue, discount or borrow money upon any commercial paper or negotiable instruments, or promissory notes, or warehouse receipts, or mortgages, or bonds, or any other kind of property or security owned by or under the control of the Association;

g. To act as the agent, representative, or broker of its members in any of the above activities;

h. To purchase, or otherwise acquire, and to hold, own, exercise all rights of ownership over, sell, transfer or pledge or guarantee the payment of shares of the capital stock, or bonds, or securities of any corporation or association engaged in the processing, or drying, or grading, or storing, or shipping, or handling, or manufacturing, or marketing of any tobacco or tobacco products, in furtherance of any of the above mentioned activities;

i. To buy, hold, lease, construct, contract for the use of and exercise all privileges of ownership over such real or personal property as may be necessary or convenient for the conduct and operation of any of the business of the Association;

j. To acquire, own, develop any interest in patents, trade marks or copyrights, connected with the handling or manufacturing or marketing of the tobacco or tobacco products of the Association or its members;

k. And to do each and everything necessary, suitable or proper, in the judgment of the Directors of this Association, anywhere throughout the world, for the accomplishment of any of the purposes or attainment of any one or more of the objects herein enumerated, or which shall at any time appear conducive to or expedient for the interests or benefit of the Association and the members thereof and to contract accordingly.

l. The Burley Tobacco Growers Co-operative Association shall make no profits for itself from any of its activities; but all of its operations shall be for the mutual benefit of its members only and shall be co-operative in character.

The operations and activities of this Association shall

be limited to activities arising out of the processing, drying, grading, shipping, storing, warehousing, handling, manufacturing, and marketing of the tobacco, or tobacco products of the Association and of its members only and to the financing of any of the said operations or of its members.

The Association shall not be permitted to buy or sell tobacco except from and for its members only and on a standard co-operative basis. It shall not buy or handle any tobacco whatsoever from non-members; or be permitted to go in the open market to buy tobacco or any tobacco products whatsoever.

m. The Association is expressly forbidden to do anything with the intent or effect of lessening the production or use or consumption of tobacco; but this Association shall do everything within its power to prevent speculation in the handling of tobacco and tobacco products and to secure for its members a fair price for their tobacco or tobacco products in the markets of the world; and to do everything reasonable within its powers to stabilize to a fair level downward, the prices to be paid by the ultimate consumers; to increase the sale, use and consumption of tobacco and tobacco products by all possible commercial and merchandising methods; and to use every possible means to improve the supply and to extend and increase the demand for tobacco and tobacco products.

n. This Association shall have and exercise all powers, privileges and rights authorized by the laws of this State and all powers and rights incident thereto.

3. The place where the principal business of Burley Tobacco Growers Co-operative Association will be transacted is Lexington, Fayette County, State of Kentucky.

4. The term for which the Burley Tobacco Growers Co-operative Association is to exist is twenty (20) years from and after the day of incorporation.

5. The Burley Tobacco Growers Co-operative Association shall be managed by a Board of twenty-five (25) Directors. The names and residences of those selected to serve for the first year and until their successors shall have been elected and qualified, are:

NAME:	RESIDENCE:	
James C. Stone,	Lexington, Fayette County,	Ky.
Sam'l Clay,	Paris, Bourbon County,	"
C. F. Walters,	Shelbyville, Shelby County,	"
J. N. Kehoe,	Maysville, Mason County,	"
F. V. Nunnelley,	Georgetown, Scott County,	"
O. C. Ellis,	Ripley, Brown County, Ohio.	
Everett McClure,	Aurora, Ohio County, Indiana.	
J. B. Winn,	Versailles, Woodford County,	Ky.
P. B. Gaines,	Carrollton, Carroll County,	"
H. K. Bourne,	Newcastle, Henry County,	"
Dawson Chambers,	Walton, R. F. D. 1, Kenton Co.	"
J. R. Jones,	Cynthiana, Harrison County,	"
C. D. Asbury,	Augusta, Bracken County,	"
Ben T. Wright,	Mt. Sterling, Montgomery Co.,	"
J. H. Sousley,	Flemingsburg, Fleming Co.,	"
W. H. Shanks,	Stanford, Lincoln County,	"
Bush W. Allin,	Harrodsburg, Mercer County,	"
I. H. Thurman,	Springfield, Washington Co.,	"
T. S. Burnam,	Richmond, Madison County,	"
E. T. Holloway,	Taylorsville, Spencer Co.,	"
J. D. Craddock,	Munfordville, Hart County,	"
R. P. Taylor,	Winchester, Clark County,	"
R. M. Barker,	Carrollton, Carroll County,	"
Robt. E. Beatty,	Lexington, Fayette County,	"
Wm. Collins,	North Middletown, Bourbon Co.	"

6. The Burley Tobacco Growers Co-operative Association shall not have any capital stock; but shall admit members into the Association upon payment of an entrance fee of Five ($5.00) Dollars and other uniform conditions.

The voting power of the members of this Association shall be equal; and each member shall have one vote only.

The property rights and interests of each member shall be equal; and each member shall have one unit of property rights only.

7. The private property of the members shall not be subject to the payment of corporation debts; and no member shall be liable for the debts of the Association to any amount exceeding the unpaid balance of his entrance fee.

In witness whereof, we have hereunto subscribed our names this 11th day of January, 1922.

James C. Stone,
R. P. Taylor,
Ben T. Wright,
W. H. Shanks,
T. S. Burnam,
E. T. Holloway,
Dawson Chambers,
Bush W. Allin,
J. R. Jones,
J. D. Craddock,
H. K. Bourne,
P. B. Gaines,
O. C. Ellis,
J. H. Sousley,
F. V. Nunnelley,
J. N. Kehoe,
J. B. Winn,
I. H. Thurman,
Everett McClure,
C. D. Asbury,
Sam'l Clay,
C. F. Walters,
R. M. Barker,
Robt. E. Beatty,
Wm. Collins.

State of Kentucky, }
Fayette County. }

Before me, a Notary Public within and for said County and State, on this 11th day of January, 1922, personally appeared James C. Stone, known to me to be one of the identical persons who executed the within and foregoing instrument; and he acknowledged to me that he had executed the same as his free and voluntary act and deed for the uses and purposes therein set forth. My commission expires October 13, 1925.

Witness my hand and official seal the day and year above set forth.

(seal)

Beulah G. Spencer,
Notary Public in and for the County of Fayette, State of Kentucky.

I, Faust Foushee, Clerk of the County Court of Fayette County, in the State of Kentucky, do hereby certify that on this day the foregoing Articles of Incorporation of "Burley Tobacco Growers Co-operative Association" were produced to me in my office, and ordered to record.

Wherefore the same with certificate thereon endorsed and this my certificate have been duly recorded in my office.

Witness my hand this 11 day of January, 1922.

Faust Foushee,
Clerk.

By Margaret Kane,
D. C.

State of Kentucky, } Sct.
County of Fayette. }

I, Faust Foushee, Clerk of the County Court of Fayette County, State of Kentucky, and as such the custodian of the Seal and all Records of or appertaining to said court, do hereby certify the foregoing to be a true and accurate copy of the Articles of Incorporation of "Burley Tobacco Growers Co-operative Association" as the same appears of record in my office.

In testimony whereof, Witness my hand, the Seal of said Court, this 11 day of January, 1922.

Faust Foushee,
(seal) *Clerk, Fayette County Court.*

APPENDIX E.

"THE BINGHAM CO-OPERATIVE MARKETING ACT."

PASSED AT THE REGULAR SESSION OF THE GENERAL ASSEMBLY, WHICH WAS BEGUN IN THE CITY OF FRANKFORT, KENTUCKY, ON TUESDAY, JANUARY THE THIRD, AND ENDED ON WEDNESDAY, MARCH THE FIFTEENTH, 1922.

CHAPTER 1.

AN ACT authorizing the formation of non-profit, co-operative associations, with or without capital stock, for the purpose of encouraging the orderly marketing of agricultural products through co-operation; defining the various terms used therein; enumerating the activities and powers of such an association; prescribing the rights and privileges of membership; providing for articles of incorporation, declaring what they shall contain, manner of executing and filing, method of amending same; providing for by-laws and what they may contain; providing for method of election of directors, filling of vacancies; powers and duties of directors; division into election districts; appointment of executive committees and allotment of functions and powers; providing for officers, qualifications, election and functions; regulating issuance of membership certificates or stock and payment therefor; limiting personal liability of members for debts of association; regulating voting power of members and stockholders; authorizing issuance of preferred stock, with or without right to vote; and the retirement thereof; providing for removal of officers and directors; providing for referendum to members; providing for a marketing contract; and prescribing remedies for breach of contract, including liquidated damages, fees and all costs; authorizing injunction and general equi-

table remedies in the event of breach of agreement; stating presumption of control of products by landlords who have signed marketing agreements; providing for annual reports; providing that no provision of law in conflict with this act shall be construed as appliying to such association; providing that legal exemption of agricultural products in the possession of producers shall apply to such products in possession of, or under the control of, such associations; limiting the use of the word "Co-operative" in names for producers' co-operative marketing activities; and prescribing a penalty for violating such inhibition; permitting associations to organize other corporations or to own stock in other corporations; providing for agreements with other co-operative associations in this or other states and stating the purposes or reasons therefor; providing that associations heretofore organized may reorganize hereunder; making it a misdemeanor to induce a member to breach his marketing contract with the association, or spread false reports about it and prescribing a fine for each offense; making such offender liable to the association for a prescribed penalty therefor in a civil suit; providing liability to the association in a penal sum in certain cases for any person who knowingly solicits, persuades or permits any member of the association to breach his marketing contract; authorizing an injunction against such warehouseman; and providing for payment of all fees and costs; and setting out the reasons for such provisions; providing that no such association shall be deemed a conspiracy or an illegal combination of monopoly or in violation of any law of this State; and providing that marketing contracts shall not be considered illegal; providing that if any section of this act shall be declared unconstitutional, the remainder of the act shall not be thereby affected; providing that the general corporation laws of this State shall apply to such associations, except where inconsistent with express provisions hereof; providing for taxation respecting the association's shares and property; providing fees for filing articles of incorporations and amendments thereto; providing that this act may be hereafter indexed, and cited as "The Bingham Co-

operative Marketing Act," and declaring an emergency to exist.

Be it enacted by the General Assembly of the Commonwealth of Kentucky:

§ 1. Declaration of Policy.

(a) In order to promote, foster and encourage the intelligent and orderly marketing of agricultural products through co-operation; and to eliminate speculation and waste; and to make the distribution of agricultural products between producer and consumer as direct as can be efficiently done; and to stabilize the marketing of agricultural products, this Act is passed.

§ 2. Definitions.

As used in this act,

(a) The term "agricultural products" shall include horticultural, viticultural, forestry, dairy, live stock, poultry, bee and any farm products.

(b) The term "member" shall include actual members of associations without capital stock and holders of common stock in associations organized with capital stock.

(c) The term "association" means any corporation organized under this act; and

(d) The term "person" shall include individuals, firms, partnerships, corporations and associations.

Associations organized hereunder shall be deemed "non-profit," inasmuch as they are not organized to make profit for themselves, as such, or for their members, as such, but only for their members as producers.

(e) For the purposes of brevity and convenience this Act may be indexed, referred to and cited as "The Bingham Co-operative Marketing Act."

§ 3. Who May Organize.

Twenty (20) or more persons, a majority of whom are residents of this State, engaged in the production of agricultural products, may form a non-profit, co-operative association, with or without capital stock, under the provisions of this Act.

§ 4. Purposes.

An association may be organized to engage in any activity in connection with the marketing or selling of the agricultural products of its members, or with the harvesting, preserving, drying, processing, canning, packing, grading, storing, handling, shipping or utilization thereof, or the manufacturing or marketing of the by-products thereof; or in connection with the manufacturing, selling or supplying to its members of machinery, equipment or supplies; or in the financing of the above enumerated activities; or in any one or more of the activities specified herein.

§ 5. Preliminary Investigation.

Every group of persons contemplating the organization of an association under this act is urged to communicate with the Dean of the College of Agriculture of the University of Kentucky, who will inform them whatever a survey of the marketing conditions affecting the commodities proposed to be handled may indicate regarding probable success.

It is here recognized that agriculture is characterized by individual production in contrast to the group or factory system that characterizes other forms of industrial production; and that the ordinary form of corporate organization permits industrial groups to combine for the purpose of group production and the ensuing group marketing and that the public has an interest in permitting farmers to bring their industry to the high degree of efficiency and merchandising skill evidenced in the manufacturing industries; and that the public interest urgently needs to prevent the migration from the farm to the city in order to keep up farm production and to preserve the agricultural supply of the nation; and that the public interest demands that the farmer be encouraged to attain a superior and more direct system of marketing in the substitution of merchandising for the blind, unscientific and speculative selling of crops; and that for this purpose, the farmers should secure special guidance and instructive data from the Dean of the College of Agriculture of the University of Kentucky.

§. 6. Powers.

Each association incorporated under this Act shall have the following powers:

(a) To engage in any activity in connection with the marketing, selling, preserving, harvesting, drying, processing, manufacturing, canning, packing, grading, storing, handling or utilization of any agricultural products produced or delivered to it by its members, or the manufacturing or marketing of the by-products thereof; or any activity in connection with the purchase, hiring, or use by its members of supplies, machinery or equipment; or in the financing of any such activities; or in any one or more of the activities specified in this section. No association, however, shall handle the agricultural products of any non-member, except for storage.

(b) To borrow money without limitation as to amount of corporate indebtedness or liability; and to make advances to members.

(c) To act as the agent or representative of any member or members in any of the above mentioned activities.

(d) To purchase or otherwise acquire; and to hold, own, and exercise all rights of ownership in; and to sell, transfer or pledge, or guarantee the payment of dividends or interest on, or the retirement or redemption of, shares of the capital stock or bonds of any corporation or association engaged in any related activity or in the warehousing or handling or marketing of any of the products handled by the association.

(e) To establish reserves and to invest the funds thereof in bonds or in such other property as may be provided in the by-laws.

(f) To buy, hold and exercise all privileges of ownership, over such real or personal property as may be necessary or convenient for the conduct and operation of any of the business of the association, or incidental thereto.

(g) To do each and every thing necessary, suitable or proper for the accomplishment of any one of the purposes or the attainment of any one or more of the subjects herein enumerated; or conducive to or expedient for the interest or benefit of the association; and to

contract accordingly; and in addition to exercise and possess all powers, rights and privilegs necessary or incidental to the purposes for which the association is organized or to the activities in which it is engaged; and, in addiiton, any other rights, powers and privileges granted by the laws of this State to ordinary corporations, except such as are inconsistent with the express provisions of this Act; and to do any such thing anywhere.

§ 7. MEMBERS.

(a) Under the terms and conditions prescribed in the by-laws adopted by it, an association may admit as members, or issue common stock to, persons only engaged in the production of the agricultural products to be handled by or through the association, including the lessees and tenants of land used for the production of such products and any lessors and landlords who receive as rent all or part of the crop raised on the leased premises.

(b) If a member of a non-stock association be other than a natural person, such members may be represented by any individual, associate, officer or manager or member thereof, duly authorized in writing.

(c) One association organized hereunder may become a member or stockholder of any other association or associations organized hereunder.

§ 8. ARTICLES OF INCORPORATION.

Each association formed under this act must prepare and file articles of incorporation, setting forth:

(a) The name of the association.

(b) The purposes for which it is formed.

(c) The place where its principal business will be transacted.

(d) The term for which it is to exist, not exceeding fifty (50) years.

(e) The number of directors thereof, which must be not less than five (5) and may be any number in excess thereof; the term of office of such directors; and the names and addresses of those who are to serve as incorporating directors for the first term, or until election and qualification of their successors.

(f) If organized without capital stock, whether the

property rights and interest of each member shall be equal or unequal; and if unequal, the general rule or rules applicable to all members by which the property rights and interests, respectively, of each member may and shall be determined and fixed; and provision for the admission of new members who shall be entitled to share in the property of the association with the old members, in accordance with such general rule or rules. This provision or paragraph of the articles of incorporation shall not be altered, amended, or repealed except by the written consent or vote of three-fourths of the members.

(g) If organized with capital stock, the amount of such stock and the number of shares into which it is divided and the par value thereof.

The capital stock may be divided into preferred and common stock. If so divided, the articles of incorporation must contain a statement of the number of shares of stock to which preference is granted and the number of shares of stock to which no preference is granted and the nature and definite extent of the prefrence and privileges granted to each.

The articles must be subscribed by the incorporators and acknowledged by one of them before an officer authorized by the law of this State to take and certify acknowledgments of deeds and conveyances; and shall be filed in accordance with the provisions of the general corporation law of this State; and when so filed the said articles of incorporation, or certified copies thereof, shall be received in all the courts of this State and other places, as prima facie evidence of the facts contained therein and of the due incorporation of such association. A certified copy of the articles of incorporation shall also be filed with the Dean of the College of Agriculture of the University of Kentucky.

§ 9. Amendments to Articles of Incorporation.

The articles of incorporation may be altered or amended at any regular meeting or any special meeting called for that purpose. An amendment must first be approved by two-thirds of the directors and then adopted by a vote representing a majority of all the members of the association. Amendments to the articles of incorporation, when so adopted, shall be filed in accordance with

the provisions of the general corporation law of this State.

§ 10. By-Laws.

Each association incorporated under this Act must, within thirty (30) days after its incorporation, adopt for its government and management, a code of by-laws, not inconsistent with the powers granted by this Act. A majority vote of the members or stockholders, or their written assent, is necessary to adopt such by-laws. Each association, under its by-laws, may provide for any or all of the following matters:

(a) The time, place and manner of calling and conducting its meeting.

(b) The number of stockholders or members constituting a quorum.

(c) The right of members or stockholders to vote by proxy or by mail or both; and the conditions, manner, form, and effects of such votes.

(d) The number of directors constituting a quorum.

(e) The qualifications, compensations and duties and term of office of directors and officers; time of their election and the mode and manner of giving notice thereof.

(f) Penalties for violations of the by-laws.

(g) The amount of entrance, organization and membership fees, if any; the manner and method of collection of the same; and the purposes for which they may be used.

(h) The amount which each member or stockholder shall be required to pay annually or from time to time, if at all, to carry on the business of the association; the charge, if any, to be paid by each member or stockholder for services rendered by the association to him and the time of payment and the manner of collection; and the marketing contract between the association and its members or stockholders which every member or stockholder may be required to sign.

(i) The number and qualification of members or stockholders of the association and the conditions precedent to membership or ownership of common stock; the method, time and manner of permitting members to withdraw or the holders of common stock to transfer their

stock; the manner of assignment and transfer of the interest of members and of the shares of common stock; the conditions upon which and time when membership of any member shall cease; the automatic suspension of the rights of a member when he ceases to be eligible to membership in the association; and the mode, manner and effect of the expulsion of a member; the manner of determining the value of a member's interest and provision for its purchase by the association upon the death or withdrawal of a member or stockholder, or upon the expulsion of a member or forfeiture of his membership, or, at the option of the association, the purchase at a price fixed by conclusive appraisal by the board of directors. In case of the withdrawal or expulsion of a member, the board of directors shall equitably and conclusively appraise his property interests in the association and shall fix the amount thereof in money, which shall be paid to him within one year after such expulsion or withdrawal.

§ 11. General and Special Meetings—How Called.

In its by-laws, each association shall provide for one or more regular meetings annually. The board of directors shall have the right to call a special meeting at any time; and ten per cent of the members or stockholders may file a petition stating the specific business to be brought before the association and demand a special meeting at any time. Such meeting must thereupon be called by the directors. Notice of all meetings, together with a statement of the purposes therof, shall be mailed to each member at least ten days prior to the meeting; provided, however, that the by-laws may require instead that such notice may be given by publication in a newspaper of general circulation, published at the principal place of business of the association.

§ 12. Directors—Election.

The affairs of the association shall be managed by a board of not less than five directors, elected by the members or stockholders from their own number. The by-laws may provide that the territory in which the association has members shall be divided into districts and that the directors shall be elected according to such districts, either directly or by district delegates elected by the members in that district. In such a case the by-

laws shall specify the number of directors to be elected by each district, the manner and method of reapportioning the directors and of redistricting the territory covered by the association. The by-laws may provide that primary elections shall be held in each district to elect the directors apportioned to such districts and that the result of all such primary elections may be ratified by the next regular meeting of the association or may be considered final as to the association. The by-laws may provide that one or more directors may be appointed by any public official or commission or by the other directors selected by the members or their delegates. Such directors shall represent primarily the interest of the general public in such associations. The director or directors so appointed need not be members or stockholders of the association; but shall have the same powers and rights as other directors. Such directors shall not number more than one-fifth of the entire number of directors.

An association may provide a fair remuneration for the time actually spent by its officers and directors in its service and for the service of the members of its executive committee. No director, during the term of his office shall be a party to a contract for profit with the association differing in any way from the business relations accorded regular members or holders of common stock of the association or others, or differing from terms generally current in that district.

The by-laws may provide for an executive committee and may allot to such committee all the functions and powers of the board of directors, subject to the general direction and control of the board.

When a vacancy on the board of directors occurs other than by expiration of term, the remaining members of the board, by a majority vote, shall fill the vacancy, unless the by-laws provide for an election of directors by district. In such a case the board of directors shall immediately call a special meeting of the members or stockholders in that district to fill the vacancy.

§ 13. Election of Officers.

The directors shall elect from their number a president and one or more vice presidents. They shall also elect a secretary and a treasurer, who need not be direc-

tors or members of the association; and they may combine the two latter offices and designate the combined office as secretary-treasurer; or unite both functions and titles in one person. The treasurer may be a bank or any depositary, and as such, shall not be considered as an officer, but as a function, of the board of directors. In such case, the secretary shall perform the usual accounting duties of the treasurer, excepting that the funds shall be deposited only as and where authorized by the board of directors.

§ 14. Stock—Membership Certificate—When Issued—Voting—Liability—Limitations on Transfer and Ownership.

When a member of an association establishes without capital stock has paid his membership fee in full, he shall receive a certificate of membership.

No association shall issue stock to a member until it has been fully paid for. The promissory notes of the members may be accepted by the association as full or partial payment. The association shall hold the stock as security for the payment of the note; but such retention as security shall not affect the member's right to vote.

No member shall be liable for the debts of the association to an amount exceeding the sum remaining unpaid on his membership fee or his subscription to the capital stock, including any unpaid balance on any promissory notes given in payment thereof.

No stockholder of a co-operative association shall own more than one-twentieth (1-20) of the common stock of the association; and an association, in its by-laws, may limit the amount of common stock which one member may own to any amount less than one-twentieth (1-20) of the common stock.

No member or stockholder shall be entitled to more than one vote, regardless of the number of shares of common stock owned by him.

Any association organized with stock under this act may issue preferred stock, with or without the right to vote. Such stock may be redeemable or retirable by the association on such terms and conditions as may be provided for by the articles of incorporation and printed on the face of the certificate.

The by-laws shall prohibit the transfer of the common stock of the association to persons not engaged in the production of the agricultural products handled by the association; and such restrictions must be printed upon every certificate of stock subject thereto.

The association may, at any time, as specified in the by-laws, except when the debts of the association exceed fifty (50) per cent of the assets thereof, buy in or purchase its common stock at the book value thereof, as conclusively determined by the board of directors, and pay for it in cash which one (1) year thereafter.

§ 15. Removal of Officer or Director.

Any member may bring charges against an officer or director by filing them in writing with the secretary of the association, together with a petition signed by five per cent of the members, requesting the removal of the officer or director in question. The removal shall be voted upon at the next regular or special meeting of the association and, by a vote of the majority of the members, the association may remove the officer or director and fill the vacancy. The director or officer, against whom such charges have been brought, shall be informed in writing of the charges previous to the meeting and shall have an opportunity at the meeting to be heard in person or by counsel and to present witnesses; and the person or persons bringing the charges against him shall have the same opportunity.

In case the by-laws provide for election of directors by districts with primary elections in each district, then the petition for removal of a director must be signed by twenty per cent of the members residing in the district from which he was elected. The board of directors must call a special meeting of the members residing in that district to consider the removal of the director; and by a vote of the majority of the members of that district, the director in question shall be removed from office.

§ 16. Referendum.

Upon demand of one-third of the entire board of directors, any matter that has been approved or passed by the board must be referred to the entire membership or the stockholders for decision at the next special or regular meeting; provided, however, that a special meeting may be called for the purpose.

§ 17. Marketing Contract.

The association and its members may make and execute marketing contracts, requiring the members to sell, for any period of time, not over ten years, all or any specified part of their agricultural products or specified commodities exclusively to or through the association, or any facilities to be created by the association. If they contract a sale to the association, it shall be conclusively held that title to the products passes absolutely and unreservedly, except for recorded liens, to the association upon delivery; or at any other specified time if expressly and definitely agreed in the said contract. The contract may provide that the association may sell or re-sell the products delivered by its members, with or without taking title thereto; and pay over to its members the resale price, after deducting all necessary selling, overhead and other costs and expenses, including interest on preferred stock, not exceeding eight (8) per cent per annum, and reserves for retiring the stock, if any; and other proper reserves; and interest not exceeding eight (8) per cent per annum upon common stock.

§ 18. Remedies for Breach of Contract.

(a) The by-laws or the marketing contract may fix, as liquidated damages, specific sums to be paid by the member or stockholder to the association upon the breach by him of any provision of the marketing contract regarding the sale or delivery or withholding of products; and may further provide that the member will pay all costs, premiums for bonds, expenses and fees, in case any action is brought upon the contract by the association; and any such provisions shall be valid and enforceable in the courts of this State; and such clauses providing for liquidated damages shall be enforceable as such and shall not be regarded as penalties.

(b) In the event of any such breach or threatened breach of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract and to a decree of specific performance thereof. Pending the adjudication of such an action and upon filing a verified complaint showing the breach or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a

temporary restraining order and preliminary injunction against the member.

(c) In any action upon such marketing agreements, it shall be conclusively presumed that land-owner or landlord or lessor is able to control the delivery of products produced on his land by tenants or others, whose tenancy or possession or work on such land or the terms of whose tenancy or possession or labor thereon were created or changed after execution by the landowner or landlord or lessor, of such a marketing agreement; and in such actions, the foregoing remedies for non-delivery or breach shall lie and be enforceable against such land-owner, landlord or lessor.

§ 19. Purchasing Business of Other Associations, Persons, Firms or Corporations—Payment—Stock Issued.

Whenever an association, organized hereunder with preferred capital stock, shall purchase the stock or any property, or any interest in any property of any person, firm or corporation or association, it may discharge the obligations so incurred, wholly or in part, by exchanging for the acquired interest, shares of its preferred capital stock to an amount which at par value would equal the fair market value of the stock or interest so purchased, as determined by the board of directors. In that case the transfer to the association of the stock or interest purchased shall be equivalent to payment in cash for the shares of stock issued.

§ 20. Annual Reports.

Each association formed under this act shall prepare and make out an annual report on forms to be furnished by the Dean of the College of Agriculture of the University of Kentucky, containing the name of the association; its principal place of business; and a general statement of its business operations during the fiscal year, showing the amount of capital stock paid up and the number of stockholders of a stock association or the number of members and amount of membership fees received, if a non-stock association; the total expenses of operations; the amount of its indebtedness or liabilities and its balance sheets.

§ 21. Conflicting Laws Not to Apply.

Any provisions of law, which are in conflict with this Act shall not be construed as applying to the associations herein provided for.

Any exemptions under any and all existing laws applying to agricultural products in the possession or under the control of the individual producer, shall apply similarly and completely to such products delivered by its farmer members, in the possession or under the control of the association.

§ 22. Limitation of the Use of Term "Co-operative."

No person, firm, corporation or association, hereafter organized or doing business in this State, shall be entitled to use the word "co-operative" as part of its corporate or other business name or title for producers' co-operative marketing activities, unless it has complied with the provisions of this act.

Any person, firm, corporation or association now organized and existing, or doing a producers' co-operative marketing business in this State and embodying the word "co-operative" as part of its corporate or other business name or title, and which is not organized in compliance with the provisions of this act, must, within six months from the date at which this act goes into effect, eliminate the word "co-operative" from its said corporate or other business name or title.

§ 23. Interest in Other Corporations or Associations.

An association may organize, form, operate, own, control, have an interest in, own stock of, or be a member of any other corporation or corporations, with or without capital stock, and engaged in preserving, drying, processing, canning, packing, storing, handling, shipping, utilizing, manufacturing, marketing or selling of the agricultural products handled by the association, or the by-products thereof.

If such corporations are warehousing corporations, they may issue legal warehouse receipts to the association against the commodities delivered by it, or to any other person and such legal warehouse receipts shall be considered as adequate collateral to the extent of the

usual and current value of the commodity represented thereby. In case such warehouse is licensed or licensed and bonded under the laws of this State or the United States, its warehouse receipt delivered to the association on commodities of the association or its members, or delivered by the association or its members, shall not be challenged or discriminated against because of ownership or control, wholly or in part, by the association.

§ 24. Contracts and Agreements with Other Associations

Any association may, upon resolution adopted by its board of directors, enter into all necessary and proper contracts and agreements and make all necessary and proper stipulations, agreements and contracts and arrangements with any other co-operative corporation, association or associations, formed in this or in any other State, for the co-operative and more economical carrying on of its business or any part or parts thereof. Any two or more associations may, by agreement between them, unite in employing and using or may separately employ and use the same personnel, methods, means and agencies for carrying on and conducting their respective businesses.

§ 25. Associations Heretofore Organized May Adopt the Provisions of This Act.

Any corporation or association, organized under previously existing statutes, may, by a majority vote of its stockholders or members, be brought under the provisions of this act by limiting its membership and adopting the other restrictions as provided herein. It shall make out in duplicate a statement signed and sworn to by its directors to the effect that the corporation or association has, by a majority vote of the stockholders or members, decided to accept the benefits and be bound by the provisions of this act and has authorized all changes accordingly. Articles of incorporation shall be filed as required in Section 8, except that they shall be signed by the members of the then board of directors. The filing fee shall be the same as for filing an amendment to articles of incorporation.

(a) Where any association may be incorporated under this act, all contracts heretofore made by or on behalf of same by the promoters thereof in anticipation of

ch association becoming incorporated under the laws this State, whether such contracts be made by or in e name of some corporation organized elsewhere and nen same would have been valid if entered into subse- ent to the passage of this act, are hereby validated as made after the passage of this act.

§ 26. Misdemeanor to Induce Breach of Marketing ntract of Co-operative Association—Spreading False ports About the Finances or Management Thereof.

Any person or persons or any corporation whose offi- rs or employes knowingly induce or attempt to induce y member or stockholder of an association organized reunder to breach his marketing contract with the as- ciation, or who maliciously and knowingly spreads lse reports about the finances or management thereof, all be guilty of a misdemeanor and be subject to a fine not less than one hundred ($100) dollars and not more an one thousand ($1,000) dollars for each such offense; d shall be liable to the association aggrieved in a civil it in the penal sum of five hundred ($500) dollars for ch such offense.

§ 27. Warehouseman Liable for Damages for En- uraging or Permitting Delivery of Products in Vio- tion of Marketing Agreements.

Any person, firm or corporation conducting a ware- use within the State of Kentucky who solicits or per- ades or permits any member of any association organ- d hereunder to breach his marketing contract with the sociation by accepting or receiving such member's oducts for sale or for auction or for display for sale, ntrary to the terms of any marketing agreement of ich said person or any member of the said firm or any ive officer or manager of the said corporation has owledge or notice, shall be liable to the association grieved in a civil suit in the penal sum of five hundred 00) dollars for each such offense; and such associ- on shall be entitled to an injunction against such rehouseman to prevent further breaches and a mul- licity of actions thereon. In addition, said warehouse- n shall pay to the association a reasonable attorney's and all costs involved in any such litigation or pro- dings at law.

This section is enacted in order to prevent a recur rence or outbreak of violence and to give marketing as sociations an adequate remedy in the courts agains those who encourage violation of co-operative contracts

§ 28. Associations Are Not in Restraint of Trade.

Any association organized hereunder shall be deeme not to be a conspiracy nor a combination in restraint o trade nor an illegal monopoly; nor an attempt to lesse competition or to fix prices arbitrarily or to create combination or pool in violation of any law of this state and the marketing contracts and agreements between th association and its members and any agreements author ized in this act shall be considered not to be illegal nor i restraint of trade nor contrary to the provisions of an statute enacted against pooling or combinations.

§ 29. Constitutionality.

If any section of this act shall be declared unconstitu tional for any reason, the remainder of this act shal not be affected thereby.

§ 30. Application of General Corporation Laws.

The provisions of the general corporation laws of thi State and all powers and rights thereunder, shall appl to the associations organized hereunder, except where such provisions are in conflict with or inconsistent wit the express provisions of this Act.

§ 31. Taxation.

The shares of corporations organized under this ac shall be taxable as against the owner thereof of the pe riod of assessment of other personal property for taxa tion in this State.

Such shares will represent in the aggregate all th property held or owned by such corporation, and when taxed as against the individual owner, all of the property in the name of said association will thereby be taxed.

Under existing law, crops grown in the year of assess ment are exempt from tax whilst owned by the producer So much of the value of each share of said stock as may represent the owner's proportion of crops grown by him and delivered to the association as herein provided, shall be exempt from taxation, inasmuch as it is the same

thing exempted now by the constitution and laws of this State to such grower.

§ 32. FILING FEES.

For filing Articles of Incorporation, an Association organized hereunder shall pay Ten ($10) Dollars; and for filing an amendment to the Articles, Two and 50-100 ($2.50) Dollars.

§ 33. WHEREAS, the agricultural interests of the State are of the utmost importance to the people of Kentucky; and

WHEREAS, a demoralized condition of the farming interests of the State exists, injuriously affecting all other business; and

WHEREAS, the highest interest of the State generally, demand immediate relief; and

WHEREAS, this Act is designed and intended to afford such relief,

THEREFORE, an emergency is declared to exist and this Act shall become effective immediately upon its passage and approval as required by law.

Approved January 10, 1922.



CHARTS TOO LARGE FOR FILMING